IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-5364

DARNELL BROWN,

PETITIONER

VERSUS

STATE OF LOUISIANA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE

STATE OF LOUISIANA

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SUPREME COURT OF THE UNITED STATES

NUMBER _____

DARNELL BROWN,

PETITIONER

VS.

STATE OF LOUISIANA,

RESPONDENT

PETITION FOR WRIT OF CERIORARI

TO THE

SUPREME COURT OF THE STATE

OF LOUISIANA

Darnell Brown respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the Louisiana Supreme Court rendered and entered in case Number 63,171 of that Court May 21, 1979, affirming the judgment of the Criminal District Court, State of Louisiana, Parish of Orleans, Section "F" entered August 23, 1978.

TABLE OF CONTENTS

	PAGE
CERTIFICATE OF SERVICE	1
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	2
AFFIDAVIT IN SUPPORT OF IN FORMA PAUPERIS	3
PETITION FOR WRIT OF CERTIORARI	4a,b
OPINION BELOW	5
BASIS OF JURISDICTION	5
QUESTION PRESENTED	5
STATEMENT OF THE CASE	5
ARGUMENT	6
CONCLUSION	11
APPENDIX I	
APPENDIX II	
APPENDIX III	

INDEX OF AUTHORITIES

CASES	PAGE
Ballew v. Georgia, 435, U.S. 233 (1978)	10
Burch v. Louisiana, ___U.S.___ (1979)	9, 10
Daniel v. Ibuisiana, 420 U.S. 311 (1975)	9
Desist v. U.S., 394 U.S. 244 (1969)	9
DeStefano v. Woods, 392 U.S. 631 (1968)	9
Gideon v. Wainwright, 372 U.S. 335 (1963)	7
Gilbert v. California, 388 U.S. 263(1967)	8
Griffin v. Illinois, 351 U.S. 12 (1956)	7
Hankerson v. North Carolina, 432, U.S. 223 (1977)	9
Jackson v. Denno, 378, U.S. 368 (1964)	7, 8
Katz v. U.S., 389 U.S. 347 (1967)	9
Linkletter v. Walder, 381 U.S. 618 (1965)	7, 8
Mackey v. U.S. 401 U.S. 667 (1971)	9
Roberts v. Russel, 392 U.S. 293 (1968)	8
Robinson v. Georgia, 435 U.S. 991 (1978)	10
Stoval v. Denno, 388 U.S. 293 (1967)	8
U.S. v. Wade , 388 U.S. 218 (1967)	8

	PAGE
Williams v. Florida, 399 U.S. 78 (1970)	10
Witherspoon v. Illinois, 391 U.S. 510 (1968)	8, 9
State v. Darnell Brown, So.2d (La. 1979)	7
STATUTES	PAGE
Louisiana Code of Criminal Procedure Art. 532 (9)	5
Louisiana Revised Statutes 14:62	5, 6
Louisiana Revised Statutes 15:529.1	5

4

4

OPINION BELOW

A copy of the opinion of the Louisiana Supreme Court rendered May 21, 1979 and entered on the same date, affirming the petitioner's conviction is attached hereto as Appendix I. Also included is an order by said court denying a rehearing.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

I.

WHETHER THE UNITED STATES SUPREME COURT DECISION IN BURCH V. LOUISIANA, ___U.S.___, (1979), STIKING DOWN A STATE STATUTE ALLOWING CONVICTIONS BY A NONUNANIMOUS SIX PERSON JURY, IS TO BE APPLIED RETROACTIVELY.

STATEMENT OF THE CASE

The defendant, Darnell Brown, is charged with violations of Louisiana Revised Statutes 14:62 and 15:529.1 relative to the offenses of simple burglary and being a multiple offender, respectively. A Bill of Information was filed July 31, 1978 charging defendant with simple burglary. Before trial, defendant filed a Motion to Quash the jury pursuant to Louisiana Code of Criminal Procedure Article 532 (9). The trial Court denied this Motion. On August 23,1978, defendant was tried before a 6-person jury. After a polling of the jury, the verdict was entered 5-1, guilty as charged. On August 30, 1978 defendant appeared with counsel before the trial court and argued for a Motion for a New Trial.

This motion was based on the illegality of the jury size. The trial court denied this Motion. Defendant next filed a Motion to Quash the Multiple Bill which had been filed August 23, 1978. This motion was denied. Defendant then pled guilty as charge to a violation of Louisiana Revised statutes 15:529.1

5

(the multiple offender law.) The defendant was sentenced to serve 22 years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served.

Defendant, through his counsel, filed a Motion for Appeal. The Louisiana Supreme Court affirmed defendant's conviction and sentence on May 21, 1979. Defendant applied for a rehearing based on Assignment of Error No. 1, which involved defendant's Motion to Quash the jury. The Louisiana Supreme Court denied defendant's application for rehearing on June 25, 1979. It is this denial by the Louisiana Supreme Court which comprises the subject matter of this writ application.

The facts surrounding defendant's arrest are as follows. On July 22, 1978 at 10:00 a.m. the house located at 2930 Florida Avenue, New Orleans, Louisiana as allegedly broken into by the defendant, Kenella Dixon, who lived in the other half of this double at 2932 Florida Avenue, heard some noises and called the police. Following a police investigation, Darnell Brown was apprehended inside the house. He was subsequently arrested and the trial and sentencing proceeded as stated.

ARGUMENT

ISSUE I

THE UNITED STATES SUPREME COURT DECISION IN BURCH V. LOUISIANA, ___U.S.___ (1979): STRICKING DOWN A STATE STATUTE ALLOWING CONVICTION BY A NON-AUNANIMOUS SIX-MEMBER JURY, SHALL BE APPLIED RETROACTIVELY.

The bill of information in this case charged the defendant, Darnell Brown, with violation of La. R.S. 14:62, relative to the offense of simple burglary. A jury of six persons found the defendant guilty as charged, the verdict being five to one.

In affirming defendant's conviction by a six person jury, the Louisiana Supreme Court found that Assignment of Error No. 1, which involved defendant's Motion to Quash the Petit Jury on the grounds that statutory provisions permitting less than a unanimous vote for conviction violated due process rights, dealt with a question of retroactivity. The Louisiana Supreme Court correctly noted that the United States Supreme Court had recently ruled that convictions (6)

by a nonunanimous six member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury. Burch v. Louisiana ___U.S.___(1979). After so noting, the Louisiana Supreme Court stated, "the question presented in this assignment is whether Burch, supra., is to be applied retroactively. We think not." State v. Darnell Brown, 371 So. 2d 746 (1979).

This ruling fails to note the criteria set-up by the United States Supreme Court concerning the issue of retroactivity. The product of this subject area leaves Courts with three choices affecting whether a case that substantially alters the relevant body of prior law should govern:

1. Only future cases and neither the parties before the Court nor any previous or pending cases - pure prospectivity.

2. Future cases as well as the litigants at bar but not previous or pending cases - non-retroactivity.

3. Future cases, the present litigants, and all fact situations arising before the date of the law; changing decisions that are still reviewable by direct appeal or by collateral attack - retroactivity.

Defendant strongly contends that the rule announced in Burch, supra. fits in the third category. An overview of the jurisprudence of retroactivity points to this conclusion. for a detailed discussion of relevant cases, see Ten Years of Non-Retroactivity: A critique and Proposal, 61 Va. L.R. 1557 (1975).

In Linkletter v. Walker, 381 U.S. 618 (1965), the United States Supreme Court rendered its first decision holding a previous constitutional ruling not to be wholly retroactive. The Court held the Mapp exclusionary rule was inapplicable to cases in which the conviction had become final before the date Mapp would not be served by retroactive application. Since this case, significant evolution in the Court's thinking on the subject has occurred, but all questions relating to the scope and application of the concept, it is fair to say, have not as yet been settled. Nonretroactivity has not met with uniform acceptance; a shifting minority of the Court's members have expressed opposition to or at least reservations about the doctrine.

In Linkletter, supra., the Court began to identify the factors relevant to determining whether a particular decision should be given retroactive effect. Also, the Court discussed three then recent law changing decisions which had been given full retroactivity. Giffin v. Illinois, 461 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); and Jackson v. Denno, 378 U.S. 368 (1964). The Court refered to a factor that was to occupy a central role in the development of standards for determining retroactivity. In the above three (7)

cases, the legal principle established went to the fairness of the trial - the very integrity of the factfinding process. The Court did not find this consideration applicable in Linkletter, supra., even though the case rule had already been applied to cases on direct review.

In Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court clearly stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

1. The purpose to be served by the new standards;

2. The extent of the reliance by law enforcement authorities on the old standards; and

3. The effect on the administration of justice of a retroactive application of the new standards.

Using these considerations as a guide, the Court concluded the U.S. v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 273 (1967) rules concerning counsel for confrontations for identification procedures merited only prospective application. While conceding the Wade and Gilbert requirement sought in part to avoid unfairness at trial by enhancing the reliability of the fact finding process, the Court balanced this purpose against reliance and effect. The Court seemed influenced by the lack of any foreshadowing of the new rule.

Thus, the United States Supreme Court set up the Stovall criteria to act as guidelines to resolve the retroactivity issue. Using these guidelines, the United States Supreme Court was able to apply retroactivity to a ruling which established new rules for the composition of juries in capitol cases, Witherspoon v. Illinois, 391 U.S. 510 (1968). In so doing, the Court concluded that improper jury-selecton standards could undermine the integrity of the guilt-determining process. (Witherspoon v. Illinois, footnote 22). Also, in Roberts v. Russel, 392 U.S. 293 (1968), the Court held the Bruton rule to be fully retroactive bacause the error seriously undermines the reliability of the trial process and the Court felt Bruton ought to have been clearly anticipated in light of Jackson v. Denno, supra.

On the other hand, the United States Supreme Court, using the Stovall guidelines applied prospectively the Duncan rule that States cannot deny requests for a jury trial in serious criminal cases. The Court found a good faith reliance on past holdings, predicted a large effect on law enforcement; and deter-

8

mined the value implemented by Duncan would not be measurably served. DeStefano v. Woods, 392 U.S. 631 (1968).

Similarly, the United States Supreme Court found prospectivity in Desist v. U.S. 394 U.S. 244 (1969) - dealing with the earesdropping rule adopted in Katz v. U.S., 389 U.S. 347 (1967); in Mackey v. U.S., 401 U.S. 667 (1971)-involving a collateral challenge to an income tax evasion procured through the use of wagering taz forms filed by the defendant under a statute subsequently found to violate the 5th amendment; and in Daniel v. Louisiana, 420 U.S. 311 (1975) - involving the Taylor rule that exclusion of women from jury venire deprives a defendant of his 6th amendment right to trial by an impartial jury.

Finally, in Hankerson v. North Carolina, 432 U.S. 223 (1977), the United States Supreme Court concluded the Mullaney rule requiring States to establish all elements of a criminal offense beyond a reasonable doubt should be given retroactive application. The defendant was convicted prior to Mullaney but the North Carolina Supreme Court refused to give the rule retroactive application, although stating the trial court's instructions to the jury was erroneous.

The United States Supreme Court concluded the State Court erred stating:

> "While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider the state's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the factfinding process is sufficiently small; where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdict in past trials, the new rule is given complete retroactive effect."

Thus, the United States Supreme Court has set up a hierarchy among the non-retroactivity criteria with the foremost factor being the purpose to be served by the new rule. In the present situation, the United States Supreme Court clearly States the Purpose of its decision in Burch v. Louisiana, supra.:

> "However, much the same reasons that led us in Ballew to decide that use of a five member jury threatened the fairness of the proceeding and proper role of the jury, lead us to conclude now that conviction for a non petty offense by only five members of a six person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous."

This Burch rule enhances the integrity of the factfinding process by preserving the substance of the jury trial and the uprightness of the guilt-determining conduct. (See Witherspoon v. Illinois, supra. footnote 22 where the United States Supreme Court concluded that improper jury-selection standards could

9

determine the integrity of the guilt-determining process.) This new rule raises serious questions concerning the accuracy of guilty verdicts in past trials. The Court in Burch relied on Ballew v. Georgia, 435, U.S. 223 (1978). The premise found in Ballew was that as the jury size decreases, the jury reliability decreases along with the accuracy of a guilty verdict. Thus, to improve this accuracy the Court in Ballew struck down five person juries; likewise the Court in Burch struck down nonunaniminty in six person juries. The first, and most important, criteria points towards retroactive application in the present situation.

Although the United States Supreme Court has not formally ruled on the retroactivity issue concerning the rule announced in Ballew, supra., the Court has, in effect, applied the Ballew retroactively. In Robinson v. Georgia, 435 U.S. 991 (1978) where defendant raised the jury-size issue, the United States Supreme Court vacated the lower court's judgment and remanded the case in light of Ballew v. Georgia, supra. Since the United States Supreme Court is willing to treat Ballew retroactively, then the Court must be willing to treat Burch retroactively due to the fact Burch relied on Ballew's rationale.

Also, petitioner contends Ballew v. Georgia, supra. and Williams v. Florida, 399 U.S. 78 (1970) foreshadowed the holding in Burch, thus obviating any good faith reliance on the State's part. Finally, the effect on the administration of justice would be small indeed. The Court in Burch pointed out only two states had previously allowed nonunanimous six person juries. Within these states, the issue raised here would be moot in all convictions rendered by a 6-0 verdict. More importantly, in the present case, petitioner's conviction was not yet final when the United States Supreme Court handed down its opinion in the Burch case. (April 17, 1979; whereas the Louisiana Supreme Court affirmed petitioner's conviction May 21, 1979). This raises the basic question of why should the Constitution mean one thing to Burch and another to the petitioner, particularly when both litigants are situated similarly in all pertinent respects.

Petitioner submits the answer to this question lies in the fact the situation in the present case points towards full retroactivity of the rule handed down in Burch v. Louisiana, supra. The Louisiana Supreme Court erred in not so ruling.

10

CONCLUSION

It is respectfully requested that this petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court be granted.

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11

SUPREME COURT OF LOUISIANA

MAY 21 1979

STATE OF LOUISIANA

VS. NUMBER 63,171

DARNELL BROWN

APPEAL FROM THE CRIMINAL DISTRICT COURT, SECTION "F," PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, PRESIDING JUDGE.

* * *

FBB BLANCHE, Justice.

Defendant, Darnell Brown, was charged by bill of information with simple burglary in violation of LSA-R.S. 14:62. On August 23, 1978, after trial before a jury of six persons, defendant was found guilty as charged, the verdict being five to one. Thereafter, the State filed a bill of information pursuant to LSA-R.S. 15:529.1 charging defendant as a third felony offender. At the multiple offender hearing defendant pled guilty and was sentenced as an habitual offender to serve twenty-two years at hard labor in the custody of the Department of Corrections.

Defendant has assigned ten errors as the basis for his appeal before this Court.

In July, 1978, Levertes Dorsch and her daughter, Kenella Dixon, were living respectively at 2930 and 2932 Florida Avenue, a double shotgun house located in New Orleans. On the morning of July 20, 1978, Ms. Dixon took her mother to work and then stopped to pick up some things at the supermarket. After she returned home at about 10:00 a.m., she heard noises which sounded like footsteps from her mother's side of the double. After a brief investigation outside during which she observed that a back window had been broken, she called the police. Defendant was discovered inside Ms. Dorsch's residence by the law enforcement officers. He had been packing various items

	APPROVE	DISSENT	CONCUR	OTHER
	✓			
			✓	
	✓			
	✓			✓
				✓
	✓			

in the house, including cameras, radio, television, et cetera, into boxes and pillow cases. Defendant was arrested and subsequently charged with simple burglary.

Before the trial court, ten assignments of error were filed on behalf of defendant. In brief, no argument has been presented relative to assignments of error numbers three and eight, and they are considered abandoned. State v. Edwards, 261 La. 1014, 261 So.2d 649 (1972).

Assignment No. 1

By this assignment, defendant argues that the trial court erred in denying defendant's motion to quash the petit jury on the grounds that his due process rights were violated by statutory provisions permitting less than a unanimous vote by a jury of only six persons.

On April 17, 1979, the United States Supreme Court in Burch v. Louisiana, ___ U.S. ____, ___ S.Ct. ____, ____ L.Ed2d ___ (1979), held:

> "... [W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury."

In holding unconstitutional that portion of Article 1, § 17 of the Louisiana Constitution of 1974 which provides "a case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be before a jury of six persons, five of whom must concur to render a verdict," the Court reasoned:

> "We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least six. [Citations omitted] And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. [Citations omitted] ... But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. ...
>
> ....
>
> "... [M]uch the same reasons that led us in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding and the

proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. ..."

The question presented in this assignment is whether Burch, supra, is to be applied retroactively. We think not.

Our review of decisions by the United States Supreme Court in other closely related areas leads us to the conclusion that the rule of Burch, supra, should not be applied retroactively to juries empaneled prior to the date of the Burch decision. See Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed2d 306 (1977); Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed2d 790 (1975); DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); State v. Robinson, 361 So.2d 864 (La.1978).

Since at the time of the commission of the instant offense and the defendant's conviction, Louisiana law authorized trial by jury composed of six persons, five of whom were required to concur in order to render a verdict in cases where the punishment may be confinement at hard labor or confinement without hard labor for more than six months, Article 1, § 17 of the Louisiana Constitution of 1974, defendant's conviction by such a jury is valid.

This assignment is, therefore, without merit.

Assignment No. 2

By this assignment, defendant argues that the trial court erred in denying his motion in limine to prevent the State from cross-examining the defendant regarding the details of defendant's convictions for impeachment purposes and in permitting the State to do so during trial.

During the trial, the defendant took the stand and testified in his own behalf. On direct-examination, defendant was questioned about prior convictions. He related that he had four or five prior convictions, including burglary, theft,

3

simple escape and trespass, and at the time of trial was on probation for attempted simple burglary. On cross-examination, the following exchange took place between the prosecuting attorney and the defendant:

Q. Mr. Brown, you said you've been convicted of a couple of theft charges; is that right?

A. Yes.

Q. And I want to refer you to a charge from the 19th day of August, 1972, which charges you with attempt to commit simple burglary of a building and structure at 1206 Dryades Street. Do you recall being charged with that?

A. Yes, I do.

Q. The District Attorney in that case allowed you to plead guilty to a theft of a hundred and one dollars, is that correct?

. . . .

BY THE WITNESS:

Yes, because they was supposed to have come picked me up around the corner of the place. They had nine people out there. They come and picked me out the whole crowd.

Q. In other words, you had been charged with attempted burglary but they reduced the charge and let you plead to attempted theft?

A. Yes.

Q. Were you also convicted for receiving stolen property, one camera?

A. Yes.

Q. And I think you did say that you pled guilty to simple escape, is that right?

A. Yes.

Q. From the New Orleans Police Department; is that correct?

A. Huh?

Q. That was a simple escape from the custody of the New Orleans Police Department?

A. No, that wasn't in the custody.

Q. That wasn't?

A. No.

Q. Are you sure about that?

A. Yes.

4

Q. Didn't you plead guilty to willfully and unlawfully departing from the lawful custody of the Police Department of the City of New Orleans?

A. I pleaded guilty to--

Q. And from a place where you were lawfully detained by the said Police Department?

A. I pleaded guilty to simple escape, not from no police custody.

Q. And you also have been convicted of criminal trespass, is that correct?

A. Um-hum.

Q. Now, weren't you also charged on the 7th day of February, 1974--

. . . .

Q. Weren't you charged on the 7th of February, 1974, of a simple burglary of the building and structure at 1423 Carondelet Street, Wilson's Auto Repair Shop?

A Yes.

[Q.]And didn't the District Attorney let you ... plead to a felony theft in that case?

A. The D. A. put me down, but the man dropped the charges and they had no case.

Q. They had no case but you pled guilty to it anyway?

A. Yes, I ain't had no choice.

Q. And you were multiple billed on that, weren't you?

A. No, I wasn't.

. . . .

Q. You're sure you weren't

A. Yes, I'm sure.

Q. Do you remember what kind of sentence you got for that theft?

A. Eighteen months.

Q. Weren't you also charged on the 14th day of June, 1977 with attempting to commit simple burglary of an automobile belonging to Leroy White, with the intent to commit a theft therein?

A. I was charged with attempt simple burglary.

Q. You pled guilty to that, right?

A. Yes. I got a five year probation.

5

Q. And you also were convicted at one time in the past of being a multiple offender; is that correct?

. . . .

BY THE WITNESS:

No, I wasn't.

. . . .

Q. Did you plead guilty to being a multiple offender, after you were convicted on the attempted burglary for the automobile?

A. No.

Q. Mr. Brown, I'm going to show you what I'm going to mark for identification purposes as State's Exhibit 9, and ask you to look at this document. Is that your name?

A. Yes.

Q. Does that say "attempted simple burglary, a felony?"

A. Y[illegible]

Q. Does that say down here that you had also been convicted earlier in 1974 for theft of a hundred and one dollars?

A. Yes.

Q. Did you plead guilty to being the same person here that had been convicted of attempted simple burglary and the same person then?

A. Yes.

Q. So you were convicted of being a multiple offender; isn't that correct?

A. I don't know about that. I don't know nothing about the multiple offender law. I don't know what that means.

BY MR. HARPER:

I don't have any further questions.

In State v. Jackson, 307 So.2d 604 (La.1975), this Court reversed the prior jurisprudence and held that the prosecution, in impeaching the credibility of a defense witness, may not only establish prior convictions of the witness, but may also cross-examine the witness about the details of the prior convictions in order to show the "true nature" of the offenses. The Jackson holding has since been extended to defendants testifying

6

in their own behalf. State v. Sykes, 364 So.2d 1293 (La.1978); State v. Thompson, 364 So.2d 908 (La.1978); State v. Carter, 363 So.2d 893 (La.1978); State v. Dupar, 353 So.2d 272 (La.1977); State v. Elzie, 351 So.2d 1174 (La.1977); State v. Chenier, 343 So.2d 177 (La.1977); State v. Jackson, 339 So.2d 730 (La. 1976); State v. Williams, 339 So.2d 728 (La.1976); State v. Elam, 312 So.2d 318 (La.1975); State v. Jackson, 307 So.2d 604 (La.1975).

While reaffirming the principles set forth in Jackson, supra, and its progeny, we are, nevertheless, aware that a Jackson cross-examination is not without its limits. The extent to which the inquiry into past convictions can be permitted is dependent upon the facts of the particular case. The trial judge has great discretion in determining the depth and length of the inquiry. This discretion will not be disturbed absent a showing of abuse.

In the instant case, we believe the nature and scope of the questioning was well within the limits of Jackson and the trial judge did not abuse his discretion in overruling the defendant's motion in limine and contemporaneous objections. This assignment is, therefore, without merit.

Other Assignments

We have carefully reviewed assignments of error numbers 4, 5, 6, 9 and 10. We find that none of these assignments of error present reversible error, nor do any involve legal issues not governed by clearly established principles of law. We find these assignments to be without merit.

DECREE

Accordingly, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

7

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 63,171

DARNELL BROWN

GTC

CALOGERO, Justice, concurring

I again express my disagreement with the holdings of State v. Jackson, 307 So.2d 604 (La. 1975) and its progeny, which approve cross-examination of a testifying defendant concerning the details of prior convictions. See my dissent in State v. Chenier, 343 So.2d 177 (La. 1977). However, because a majority of the Court presently adheres to the view that this cross-examination is permissible, I respectfully concur.

1

Date: June 25, 1979

SUPREME COURT OF LOUISIANA

NO. 63,171

State of Louisiana

VERSUS

Darnell Brown

On Appeal from the Criminal District Court,
Parish of Orleans, Hon. Oliver P. Schulingkamp,
Judge Presiding

On Application for Rehearing

Denied.

FWS

AT JR

JAD

PFC

WFM

JLD

FAB

SUPREME COURT OF LOUISIANA
A TRUE COPY
Evans J. Labranche, Jr.
Clerk of Court

STATE OF LOUISIANA — NUMBER 265-832 SECTION "F"

VERSUS — CRIMINAL DISTRICT COURT

DARNELL BROWN — PARISH OF ORLEANS

ASSIGNMENT OF ERRORS AND

DESIGNATION OF RECORD FOR APPEAL

TO THE HONORABLE OLIVER SCHULINGKAMP, JUDGE, SECTION "F".

MAY IT PLEASE THE COURT:

Defendant, Darnell Brown, through his undersigned counsel, pursuant to C.Cr.P., Articles 844 and 845 respectfully designates the following errors to be urged upon the appeal of the above numbered and entitled matter, and designates the record for same.

ASSIGNMENT OF ERROR NO. 1

Prior to trial, counsel for defendant filed a Motion to Quash the petit jury on grounds that the defendant's due process rights under the Sixth and Fourteenth Amendments were violated by a less than unanimous vote by a six person jury and that defendant was entitled to a twelve person jury (Ballew v. Georgia, 98 S.Ct. 1029 (1978) (Tr. page 1 lines 7-18). Defendant objected to the court's ruling overruling the Motion to Quash.

ASSIGNMENT OF ERROR NO. 2

Prior to trial, counsel for defendant filed a request for a Motion in Liminae to prevent the State from amplifying and bringing out the nature of the charges for which defendant had been previously convicted by impeachment concerning two prior convictions of reduced charges and the charge for which defendant was arrested (Tr. page 2 line 7). Defendant objected to the court's ruling.

ASSIGNMENT OF ERROR NO. 3

During the State's voir dire examination defense counsel objected to improper statements by the prosecutor (Tr. 3 line 15); to an improper statement by the prosecutor which characterized the burden of proof as "no big thing" (Tr. page 4 lines 3-11) and to the prosecutor's improper comment on "reasonabl[illegible] doubt" (Tr. page 5 lines 1-13).

ASSIGNMENT OF ERROR NO. 4

During the opening statement by defense counsel, the Court sustained the prosecutor's objection to defense counsel's statement and limited the defendant's opening statement, (Tr. page 7 line 7) to which defense counsel objected.

ASSIGNMENT OF ERROR NO. 5

On direct examination during trial, defense counsel objected to the prosecutor leading the witness to express an opinion, (Tr. page 18 line 21) and at (Tr. page 23 lines 5-27) objected to a question which was beyond the scope of the witnesses' knowledge. The court allowed these improper comments from the State's witness over defense counsel's objection.

ASSIGNMENT OF ERROR NO. 6

During cross-examination of the defendant the prosecutor improperly commented on a statement allegedly made by the accused. Defense counsel requested the defendant's testimony read in open court to the jury to clarify his prior statement and cure the prosecutor's misleading statement. Defense counsel objected to the court's ruling refusing to have the testimony read. (Tr. page 55 lines 7-27 and page 56 lines 1-5).

ASSIGNMENT OF ERROR NO. 7

During cross-examination, defense counsel objected to the prosecutor's questions concerning the nature of the prior arrest circumstances and conviction circumstances relative to a plea to a reduced charge (Tr. page 59, 60, 61) and defense counsel moved for a mistrial (Tr. page 62 line 12) due to the prosecutor's improper reference to the characterization of a conviction as a "multiple offender." The court overruled defense counsel's objection and denied the motion for mistrial.

ASSIGNMENT OF ERROR NO. 8

Defense counsel objected to the prosecutor's closing argument (Tr. page 66 line 1-27) and renewed defendant's motion for mistrial (Tr. page 67 line 18) which was denied by the court.

ASSIGNMENT OF ERROR NO. 9

Defendant assigns as error the ruling of the trial court denying his motion for a New Trial.

ASSIGNMENT OF ERROR NO. 10

Defendant assigns as error the court's ruling on the Motion to Quash based on a previous enhanced penalty used to secure a conviction and which cannot be used to enhance another penalty.

AND NOW;

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA;

MAY IT PLEASE THE COURT:

In addition to the above ten (10) errors assigned, the defendant requests this Honorable Court to review the entire record and all of the evidence as reflected by the various transcripts, pleadings and exhibits as provided by Louisiana Constitution 1974, Article 1, Section 19.

Respectfully submitted:

JOHN M. LAWRENCE
ATTORNEY FOR DEFENDANT
ORLEANS INDIGENT DEFENDER PROGRAM
2700 TULANE AVENUE, ROOM 112
NEW ORLEANS, LOUISIANA 70119
TELEPHONE: 821-8101

CERTIFICATE

I certify that a copy of the foregoing has been delivered to the Honorable Oliver Schulingkamp, Judge, Section "F" of the Criminal District Court for the Parish of Orleans, and a copy of the foregoing has been delivered to the deputy Clerk of Court assigned to Section "F" of the Criminal District Court for the Parish of Orleans, by hand, by me on the ____ day of _____, 1978.

JOHN M. LAWRENCE

New Orleans, Louisiana,

1978

Supreme Court, U. S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN

Petitioner,

—*v.*—

LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

TABLE OF CONTENTS OF APPENDIX

	Page
Docket Entries	1
Bill of Information	4
Motion to Quash Jury	5
Assignment of Error No. 1 on Appeal	6
Decision of Louisiana Supreme Court	7
Order Denying Re-Hearing	10
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	11

DOCKET ENTRIES

For Defendant:

July 31, 1978 Minute Entry: Filed Bill of Information

August 2, 1978 Minute Entry: The defendant, accompanied by counsel John Lawrence, Esq., waived the readings of the information and pleaded not guilty, granted 10 days for pleadings. Pre-trial for 8/11/78, defendant remanded.

August 11, 1978 Minute Entry: Defendant appeared with counsel John Lawrence, Esq., specially fixed for trial on 8/23/78 and defendant remanded.

August 23, 1978 Minute Entry: Defendant accompanied by counsel Gene Fulghum Esq., placed at the bar for trial. Fred Harper Esq., and Tom Chester Esq., present for the State. The State filed written notice of intent to use confession serving defense counsel with a copy of said notice. Mr. Fulghum on behalf of defendant filed with the court a motion in Limine and a motion to quash, which motions were argued and submitted by both sides. The court DENIED both said motions and objections reserved by defense.

Both sides announced readiness for trial and the petty jury venire was brought into open court and from their number, the following named jurors, to wit: SHERILYN DONALDSON, PAUL ROSENTHAL SHRLEY FLEURY, KAY SABATHIER, THOMAS STULL and MRS. GEORGE BARACCO were regularly accepted, duly sworn and empanelled to serve as jurors in this case.

Motion of defense, all witnesses were placed before the bar and admonished by the court as to the law and then ordered sequestered.

Empanelling of the jury commenced at 12:30 P.M. and was concluded at 1:16 P.M.—CHALLENGES: STATE, 5—DEFENSE, 6. CAUSE, 0.

The clerk read the information to the jury.

Mr. Chester made the state's opening statement and Mr. Chester made the state's opening statement and Mr. Fulghum made an opening statement on behalf of defense. Motion of the state, Mrs. Kenella Dixon, Levertes Dorsch, Sgt. Ed Cloger, Off. Ronald Johnson and Off. Charles Brett were duly sworn by the clerk, testified on the part of the state and were cross-examined by the defense. The state introduced and the court ordered filed in evidence and exhibited to the jury, the following: six (6) photographs, S-1 thru S-6. Apair of gloves, S-7. An evidence tag, S-8. (objection of defense reserved to S-8 only.) THE STATE RESTS. Motion of defense, defendant Darnell Brown was duly sworn by the clerk, testified in his own behalf and was cross-examined by the state. DEFENSE RESTS. Mr. Chester argued for the state, Mr. Fulghum for the defense and Mr. Harper closed for the state. The court delivered its charge to the jury at 4:15 P.M. and at the close of its charge the court presented to the jury a written list of responsive verdicts. The jury retired to deliberate at 4:26 P.M. and returned in court at the hour of 5:30 P.M. with the following written verdict: "AUGUST 23, 1978, GUILTY AS CHARGED. (signed) THOMAS STULL, FOREMAN." The clerk read the verdict to the defendant. Motion of defense, jury polled by way of secret written ballot in accordance with law and the court found to be 5 to 1 and legal and the court ordered the verdict recorded and filed and the petty jury discharged from the case. Mr. Harper then filed a multiple bill against the defendant under R.S. 15:529.1—the court ordered sentencing and hearing on the multiple bill specially fixed for 8-30-78 and the defendant remanded without benefit of bail.

August 30, 1978 Minute Entry: Defendant appeared with counsel Gene Fulghum Esq. Defendant filed motion for a new trial which was argued and submitted by both sides and denied by the court and objection reserved by defense.

Defendant specifically waived 24 hour delay as authorized. Defendant filed motion to quash multiple bill, which was

argued and submitted by both sides and DENIED by the court and objection reserved by defense.

Defendant when waived the reading of the multiple bill and pleaded gulity as charged (triple offender) waived all delays.

The court sentenced defendant DARNELL BROWN to serve a term of twenty-two (22) years at hard labor custody of the department of corrections, credit for time served and court costs waived.

Mr. Fulghum subsequently re-appeared before the bar, some one (1) hour later and filed with court a motion for appeal which was granted by the court and made returnable on 10-30-78.

September 19, 1978 Minute Entry: John Lawrence Esq., appeared on behalf of the defendant and filed with the court Assignments of Errors and Designation of Record for Appeal.

PARISH OF ORLEANS
CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS

THE STATE OF LOUSIANA

v.

JOSEPH JOHNSON

ASSISTANT DISTRICT ATTORNEY for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one Darnell Brown late of the Parish of Orleans, on the 20th day of July in the year of our Lord, one thousand nine hundred and seventy-eight in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, committed simple burglary of the building and structure No. 2930 Florida Street, belonging to one Cornella Dixon, with the intent to commit a theft therein, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

EMERY VOORHIES
Assistant District Attorney
for the Parish of Orleans

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 265-832 Section "F"

STATE OF LOUISIANA

versus

DARNELL BROWN

MOTION TO QUASH

And now into Court through undersigned counsel, comes Darnell Brown and moves the Court for an order quashing the Petit Jury of six and requiring a Petit Jury of Twelve or in the alternative an unanimous verdict of the Petit Jury of six, for the reason that:

Defendant's due process rights under the Sixth and the Fourteenth Amendments to the United States Constitution as enunciated in *Ballew* v. *Georgia*, 98 S.Ct. 1029 (1978) will be violated by a less than unanimous vote by a six person jury. Both the Louisiana Constitution and the Code of Criminal Procedure Art. 782 specify that the offense of Simple Burglary will be tried by a Jury of six, five of whom must concur in a verdict. As *Ballew*, *Supra*, held that a five person Jury was unconstitutional, a six person Jury with less than a unanimous verdict must also be unconstitutional.

Respectfully submitted,

BERNARD E. FULGHUM, JR.
Attorney for Defendant
ORLEANS INDIGENT DEFENDER PROGRAM
2700 Tulane Avenue, Room 112
New Orleans, Louisiana 70119

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 265-832 Section "F"

STATE OF LOUISIANA

versus

DARNELL BROWN

ASSIGNMENT OF ERRORS AND
DESIGNATION OF RECORD FOR APPEAL

TO THE HONORABLE OLIVER SCHULINGKAMP, JUDGE, SECTION "F".

MAY IT PLEASE THE COURT:

Defendant, Darnell Brown, through his undersigned counsel, pursuant to C.Cr.P., Article 844 and 845 respectfully designates the following errors to be urged upon the appeal of the above numbered and entitled matter, and designates the record for same.

ASSIGNMENT OF ERROR NO. 1

Prior to trial, counsel for defendant filed a Motion to Quash the petit jury on grounds that the defendant's due process rights under the Sixth and Fourteenth Amendments were violated by a less than unanimous vote by a six person jury and that defendant was entitled to a twelve person jury (*Ballew* v. *Georgia*, 98 S.Ct. 1029 (1978) (Tr. page 1 lines 7-18). Defendant objected to the court's ruling overruling the Motion to Quash.

SUPREME COURT OF LOUSIANA

Number 63,171

May 21, 1979

STATE OF LOUISIANA

vs.

DARNELL BROWN

APPEAL FROM THE CRIMINAL DISTRICT COURT, SECTION "F", PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, PRESIDING JUDGE.

* * * *

BALNCHE, Justice.

Defendant, Darnell Brown, was charged by bill of information with simple burglary in violation of LSA-R.S. 14:62. On August 23, 1978, after trial before a jury of six persons, defendant was found guilty as charged, the verdict being five to one. Thereafter, the State filed a bill of information pursuant to LSA-R.S. 15:529.1 charging defendant as a third felony offender. At the multiple offender hearing defendant pled guilty and was sentenced as an habitual offender to serve twenty-two years at hard labor in the custody of the Department of Corrections.

Defendant has assigned ten errors as the basis for his appeal before this Court.

In July, 1978, Levertes Dorsch and her daughter, Kenella Dixon, were living respectively at 2930 and 2932 Florida Avenue, a double shotgun house located in New Orleans. On the morning of July 20, 1978, Ms. Dixon took her mother to work and then stopped to pick up some things at the supermarket. After she returned home at about 10:00 a.m., she heard noises which sounded like footsteps from her mother's side of the double. After a brief investigation outside during which she observed that a back window had been broken open, she called the

police. Defendant was discovered inside Ms. Dorsch's residence by the law enforcement officers. He had been packing various items in the house, including cameras, radio, television, et cetera, into boxes and pillow cases. Defendant was arrested and subsequently charged with simple burglary.

Before the trial court, ten assignments of error were filed on behalf of defendant. In brief, no argument has been presented relative to assignments of error numbers three and eight, and they are considered abandoned. *State* v. *Edwards*, 261 La. 1014, 261 So.2d 649 (1972).

ASSIGNMENT NO. 1

By this assignment, defendant argues that the trial court erred in denying defendant's motion to quash the petit jury on the grounds that his due process rights were violated by statutory provisions permitting less than a unanimous vote by a jury of only six persons.

On April 17, 1979, the United States Supreme Court in *Burch* v. *Louisiana*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1979), held:

> ". . . [W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury."

In holding unconstitutional that portion of Article 1, § 17 of the Louisiana Constitution of 1974 which provides "a case in which the punishment may be confinement without hard labor for more than six months shall be before a jury of six persons, five of whom must concur to render a verdict," the Court reasoned:

> "We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least six. [Citations omitted] And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. [Citations omitted] . . . But having already departed from the strictly historical requirements of jury trial, it is inevitable

> that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. . . .
>
> . . . .
>
> ". . . [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude not that conviction for a nonpetty offense by only five members of six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. . . ."

The question presented in this assignment is whether *Burch, supra,* is to be applied retroactively. We think not.

Our review of decisions by the United States Supreme Court in other closely related areas leads us to the conclusion that the rule of *Burch, supra,* should *not* be applied retroactively to juries empaneled prior to the date of the *Burch* decision. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); *Daniel* v. *Louisiana*, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975); *DeStefano* v. *Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); *State* v. *Robinson*, 361 So.2d 864 (La. 1978).

Since at the time of the commission of the instant offense and the defendant's conviction, Louisiana law authorized trial by jury composed of six persons, five of whom were required to concur in order to render a verdict in cases where the punishment may be confined at hard labor or confinement without hard labor for more than six months, Article 1, § 17 of the Louisiana Constitution of 1974, defendant's conviction by such a jury is valid.

This assignment is, therefore, without merit.

SUPREME COURT OF LOUSIANA

No. 63,171

June 25, 1979

STATE OF LOUISIANA

versus

DARNELL BROWN

ON APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, JUDGE PRESIDING

ON APPLICATION FOR REHEARING

Denied.

Denied.

FWS
AT JR
JAD
PFC
WFM
JLD
FAB

SUPREME COURT OF THE UNITED STATES

No. 79-5364

DARNELL BROWN, PETITIONER

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-5364

RECEIVED
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SUPREME COURT, U.S.

DARNELL BROWN,

PETITIONER

versus

STATE OF LOUISIANA,

RESPONDENT

Resp's Brief in opposition

By: William Guste, Jr.
Attorney General

Barbara Rutledge
Assistant Attorney General

Harry Connick
District Attorney

Louise Korns
Assistant District Attorney

Thomas Chester
Assistant District Attorney

TABLE OF CONTENTS

	Page
CERTIFICATE OF SERVICE	3
BASIS OF JURISDICTION	2
STATEMENT OF THE CASE	4
QUESTION PRESENTED	4
ARGUMENT	4
CONCLUSION	7

INDEX OF AUTHORITIES

CASES	PAGE
Burch vs. Louisiana, ___U.S.___, 99 S.Ct. 1623 (1979)	4
Hankerson vs. North Carolina, 432 U.S. 223 (1977)	5
Daniel vs. Louisiana, 419 U.S. 31 (1975)	5
Taylor vs. Louisiana, 419 U.S. 522 (1975)	5
Johnson vs. Louisiana, 406 U.S. 356 (1972)	6
DeStefano vs. Woods, 392 U.S. 631 (1968)	5
Duncan vs. Louisiana, 391 U.S. 145 (1968)	5
Stovall vs. Denno, 388 U.S. 293 (1967)	4
State vs. Darnell Brown, 371 So.2d 746 (La. 1979)	4

STATUTES

Louisiana State Constitution Art. 1, §17 (1974)

Louisiana Code of Criminal Procedure, Art. 779 (1975) as amended.

BASIS OF JURISDICTION

Jurisdiction was invoked under Title 28, United States Code, Section 1257 (3).

STATEMENT OF THE CASE

On August 23, 1978, a non-unanimous six-member jury convicted the defendant of simple burglary. La. R.S. 14:62 (1972). Subsequently, the defendant admitted to being a multiple offender, La. R.S. 15:529.1,(Jan. 1967),and was sentenced to twenty-two years at hard labor. On May 21, 1979, the Louisiana Supreme Court denied the Motion for Appeal, and on June 25, 1979, the Court denied an application for a rehearing. This denial is the subject matter of the Petitioner's application for a writ of certiorari to the United States Supreme Court.

QUESTION PRESENTED

Should the decision of the United States Supreme Court in Burch vs. Louisiana, ___U.S.___; 99 S.Ct. 1623 (1979), invalidating a conviction by a non-unanimous, six-member jury, be given prospective application?

ARGUMENT

The conviction at issue was rendered by the five-to-one verdict of a six-member jury. On appeal, the Louisiana Supreme Court affirmed, holding that Burch vs. Louisiana, ___U.S. ___; 99 S.Ct.1623 (1979) was to apply prospectively from April 17, 1979. State vs. Darnell Brown, 371 So.2d 746 (La. 1979). The Court reasoned that since the Brown jury was empanelled prior to this Honorable Court's ruling in Burch, the procedure was constitutionally sound at the time of the verdict. The State of Louisiana submits that the ruling of the Louisiana Supreme Court was correct, and that Burch should be given only prospective application.

In Stovall vs. Denno, 388 U.S. 293 (1967) this Honorable Court distilled three guidelines from the extensive jurisprudence of retroactivity:

(No page -3-)

1. The purpose to be served by the new standards.

2. The extent of the reliance by law enforcement authorities on the old standards; and

3. The effect on the administration of justice of a retroactive application of the new standards. 388 U.S. at 297

First, the State submits that the purpose[1] to be served by Burch does not necessitate retroactive application. Essentially, as petitioner admits in brief, the rule of Burch ". . . enhances the integrity of the fact-finding process . . ." (Brief of the Petitioner, page 9). It is not a rule akin to that articulated in Hankerson vs. North Carolina, 432 U.S. 223 (1977) which strikes at the very "truth finding function" itself. Indeed, in other cases involving the Sixth Amendment right to jury trial, the Court has declined to apply the doctrine of retroactivity. In Duncan vs. Louisiana, 391 U.S. 145 (1968) this Honorable Court held that the States may not deny a jury trial in serious criminal cases. Despite the fact that Duncan was directed at the availability of a jury trial itself, the Court applied the decision only prospectively. In DeStafano vs. Woods, 392 U.S. 631 (1968) the Court stated:

> "The values implemented by the right to jury trial would not be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. at 634.

In Taylor vs. Louisiana, 419 U.S. 522 (1975) the Court held that the exclusion of women from the jury venire deprives the defendant of his Sixth Amendment rights. Nevertheless, Taylor was applied only prospectively. Daniel vs. Louisiana, 419 U.S. 31 (1975).[2]

In essence, the State submits that the purpose of Burch, like that of Duncan and Taylor does not necessitate retroactive applications.[3]

Second, the State of Louisiana submits that law enforcement authorities have long relied on the old standard of conviction by five members of the six-person jury.[4] In Louisiana, the right to a jury trial attaches in all criminal offenses punishable by more than six months imprisonment. If an offense is not necessarily punishable at hard labor, the jury is composed of six persons. Article I, §17 La. Constitution of 1974; La. Code Crim. Pro. Art. 779. That is, a wide range of criminal offenses are, and have long been, triable by a six-member jury.[5]

1) In Duncan vs. Louisiana, 391 U.S. 145, at 159 (1968) the Court noted that the purpose of trial by jury is to prevent government oppression by providing a "safeguard against the corrupt or over jealous prosecutor and against the compliant, biased, or eccentric judge."

2) The Court stated:

> "In Taylor, as in Duncan, we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression.
> In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt vs. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961), in structing their criminal justice systems is clear.

3) This contention is reinforced by the Court's categorization of the Burch issue: "We agree with the Louisiana Supreme Court that the question presented is a close one." 99 S.Ct. 1623, 1625 (1979).

4) See e.g., Johnson vs. Louisiana, 406 U.S. 356 (1972) (cited by the Louisiana Supreme Court in State vs. Burch, 360 So2d 831 (1978) as authority for non-unanimous verdicts: See also Note 2, supra.

5) The following offenses are, inter alia, triable by the six-member jury: Negligent homicide, La. Crim. Code 14 §32; Aggravated Battery, La. Crim. Code 14 §34; Kidnapping, La. Crim. Code 14 §45; Arson with the intent to defraud, La. Crim. Code 14 §53; Burglary, La. Crim. Code 14 §64; Robbery, La. Crim. Code 14 §65; Theft, La. Crim. Code 14 §67; Receiving Stolen Things, La. Crim. Code 14 §69; Forgery, La. Crim. Code 14 §72.

Third, the State of Louisiana submits that retroactive application of Burch would work an intolerable hardship on the administration of criminal justice. The passage of time, the clouding of memories, and the difficulties involved in locating witnesses and victims would undoubtedly present formidible obstacles to the retrial of numerous defendants. Indeed, retroactive application would inevitably free myriad defendants simply because the case against them had fortuitously eroded over time.

CONCLUSION

For the above assigned reasons, the State of Louisiana respectfully urges this Honorable Court to deny the petitioner's application for a writ of certiorari to review the judgement of the Surpeme Court of Louisiana in Darnell Brown vs. Louisiana, 371 So.2d 746 (La. 1979).

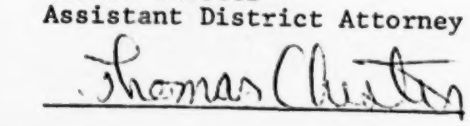
By: William Guste, Jr.
Attorney General

Barbara Rutledge
Assistant Attorney General

Harry Connick
District Attorney

Louise Korns
Assistant District Attorney

Thomas Chester
Assistant District Attorney



Supreme Court, U.S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1975) 15, 16, 17

Berger v. California, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969) 10

Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) 11, 12

Burch v. Louisiana, ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 296 (1979) ..... *passim*

Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) 8

De Stefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968) 11, 13, 14

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 11, 12, 13

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 7

Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973) 12, 14

Griffin v. Illinois, 361 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 89 (1956) 7

Page

Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 52 L.Ed.2d 306 (1977) 8, 9, 10

Ivan V. v. City of New York, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972) 10

Jackson v. Denno, 378 U.S. 365, 84 S.Ct. 1774, 12 L.Ed.2d 9081 (1969) 7

Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) 7, 9

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) 6, 7

Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) 8

Mullany v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 9

O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) 12, 13

State v. Darnell Brown, 371 So.2d 746 (La. 1979) 1, 4, 18

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) . . . . . *passim*

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1575) 13, 14

Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 358 (1971) 8, 9, 10

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) 17

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) 10, 11, 14, 15

Statutes:

Louisiana Constitution of 1974 Article 1, Section 17 4

Louisiana R.S. 14:62 4

Louisiana C.Cr.Pro. Art. 779 4

Louisiana R.S. 15:529.1 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Louisiana Supreme Court rendered May 21, 1979 and entered on the same date, affirming the petitioner's conviction is located in the Appendix of this case, reported in 371 So.2d 746 (La. 1979).

BASIS OF JURISDICTION

The petition for rehearing was denied June 25, 1979. A petition for writ of certiorari was filed on September

17, 1979, and was granted by this court on December 10, 1979. Jurisdiction of this Court lies under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

QUESTION PRESENTED

Whether the United States Supreme Court decision in *Burch v. Louisiana,* ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), striking down a state statute allowing convictions by nonunanimous six-person juries, is to be applied fully retroactively, or at least on review of a State criminal conviction not yet final at the time the *Burch* decision was handed down.

STATEMENT

On July 22, 1978 at 10:00 a.m. the house located at 2930 Florida Avenue, New Orleans, Louisiana was allegedly broken into by the defendant. Kenella Dixon, who lived in the other half of this double at 2932 Florida Avenue, heard some noises and called the police.

Following a police investigation, Darnell Brown was apprehended.

The State of Louisiana charged petitioner with violations of Louisiana revised statutes 14:62 and 15:529.1, relative to the offenses of simple burglary and being a multiple offender, respectfully. A Bill of Information was filed July 31, 1978 charging petitioner with simple burglary. Before trial, petitioner filed a Motion to Quash the Jury pursuant to Louisiana Code of Criminal Procedure Article 532(9). The trial court denied this motion. On August 23, 1978 defendant was tried before a six-person jury. After a polling of the jury, the verdict was entered 5-1, guilty as charged.

On August 30, 1978 petitioner appeared with counsel before the trial court and argued for a Motion for a New Trial, which was based on the illegality of the jury size. The trial court denied this Motion. Petitioner next filed a Motion to Quash the Multiple Bill which the State had filed August 23, 1978. This motion was denied. Defendant pled guilty as charged to a violation of Louisiana Revised Statutes 15:529.1 (the multiple offender law). The Court sentenced petitioner to serve 22 years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served.

Petitioner, through his counsel, filed a Motion for Appeal. The Louisiana Supreme Court affirmed petitioner's conviction and sentence on May 21, 1979. Petitioner applied for a rehearing based on Assignment of Error No. 1, which involved petitioner's Motion to Quash the Jury. The Louisiana Supreme Court denied this rehearing application on June 25, 1979, thus maintaining the *Burch* rule would not be applied retroactively.

ARGUMENT

THE UNITED STATES SUPREME COURT DECISION IN *BURCH v. LOUISIANA*, ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), STRIKING DOWN A STATE STATUTE ALLOWING CONVICTIONS BY A NONUNANIMOUS SIX-MEMBER JURY, SHALL BE APPLIED RETROACTIVELY.

The bill of information in this case charged the defendant, Darnell Brown, with a violation of La. R.S. 14:62, relative to the offense of simple burglary. In Louisiana, the right to a jury trial attaches in all criminal offenses punishable by more than six months imprisonment. If an offense is not necessarily punishable at hard labor, the jury is composed of six persons. Article 1, Section 17, La. Constitution of 1974; La. Code Criminal Pro., Art. 779. A jury of six persons found the defendant guilty as charged, the verdict being five to one.

In affirming defendant's conviction by this six-person jury, the Louisiana Supreme Court found that Assignment of Error No. 1, which involved defendant's motion to Quash the Petit Jury on the grounds that statutory provisions permitting less than a unanimous vote for conviction in six-person juries violated due process rights, dealt with a question of retroactivity. The Louisiana Supreme Court correctly noted that the United States Supreme Court had recently ruled that convictions by a nonunanimous six-member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury. *Burch v. Louisiana*, ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). After so noting, the Louisiana Supreme Court stated: "the question presented in this assignment is whether *Burch*, supra, is to be applied retroactively. We think not." *State v. Darnell Brown*, 371 So.2d 746, at 748 (La. 1979).

This ruling fails to note the criteria set-up by the United States Supreme Court concerning the issue of retroactivity. Upon considering the circumstances of a particular situation, a Court may determine whether an overruling decision should be given:

1) purely prospective effect, so as not even to apply it in the case in which it is announced;

2) limited retroactive effect, so that the new rule will govern the rights of the parties to the overruling case itself, but the old rule will govern the rights of parties to all other pending litigation as well as litigation terminated by "final"[1] judgment;

3) limited retroactive effect, so that the new rule will govern the rights of the parties to the overruling case and the right of parties to other cases which were pending when the overruling case was decided, but the old rule will govern the rights of parties to cases terminated by a "final" judgment prior to the time the overruling case was decided;

4) general retroactive effect, so that the new rule will apply even where "final" judgments had been obtained at the time the overruling case was decided as well as to apply in the case in which it is announced and in other cases pending at the time of the announcement of the new rule.

Defendant strongly contends that the rule announced in *Burch* fits in the fourth category; or, at least, the third category. A three-step thought process points to this conclusion. First, an overview of the jurisprudence of

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[1] "Final" here, and throughout this brief, refers to a judgment as to which the ordinary methods of review, such as appeal or certiorari, have already been exhausted or the right to utilize them has expired through passage of time.

retroactivity supplies necessary background on relevant issues.[2] Second, the *Burch* rule, which concerns the right of an accused to trial by jury under the Sixth and Fourteenth Amendments, necessitates a detailed analysis of how the United States Supreme Court has treated the retroactive issue in past Sixth Amendment right to jury trial rulings. Finally, the criteria discovered in steps one and two must apply to the present situation. Throughout this process, basic questions and problems of past practices regarding this retroactivity issue crop up. Such manifestations deserve special discussion. The resultant conclusion leads to full retroactive effect of the *Burch* rule; or, at least to limited retroactive effect, so that the *Burch* rule will govern defendant's rights in the present case, since his case was pending when *Burch* was decided.

In *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the United States Supreme Court rendered its first decision holding a previous constitutional ruling not to be wholly retroactive. The Court held the *Mapp* exclusionary rule was inapplicable to cases in which the conviction had become final before the date *Mapp* was handed down. Since this case, significant evolution in the Court's thinking on the subject has occurred, but all questions relating to the scope and application of the concept, it is fair to say, have not as yet been settled. Nonretroactivity has not met with uniform acceptance; a shifting minority of the Court's members have expressed opposition to or at least reservations about the doctrine.

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[2] For a detailed discussion of relevant cases, *see* Ten Years of Nonretroactivity: A Critique and Proposal, 61 Va. L.R. 1557 (1975), and *Supreme Court Decision-Retroactivity,* 22 L.Ed.2d 821 (1969).

In *Linkletter,* the Court began to identify the factors relevant to determining whether a particular decision should be given retroactive effect. The Court noted it must look to the prior history of the new rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation. Also, the Court discussed three then-recent law-changing decisions which had been given full retroactivity, *Griffin v. Illinois,* 361 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 89 (1956); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The Court referred to a factor that was to occupy a central role in the development of standards for determining retroactivity. In the above three cases, the legal principle established went to the fairness of the trial—the very integrity of the fact-finding process. The Court did not find this consideration applicable in *Linkletter* even though the case rule had already been applied to cases on direct review.

In holding new rules pertaining to custodial interrogation were not retroactively applicable in *Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966), the Court noted that whether a constitutional rule did or did not enhance the reliability of the fact-finding process at trial was necessarily a matter of degree. Also in this case, the Court refined the definition of non-retroactivity. Disdaining any distinction between cases on direct review and those involving convictions that had become final by the date of the law-changing decisions, the Court found that the reliance and effect factors called for an application of the new rules only to trials begun after the standards were announced. Thus, *Johnson* moved the Court significantly beyond *Linkletter* and much closer to an approach of pure

prospectivity through eliminating application of the doctrine only to cases pending on direct review.

In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the United States Supreme Court clearly stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

1) the purpose to be served by the new standards;
2) the extent of the reliance by law enforcement authorities on the old standards; and
3) the effect on the administration of justice of a retroactive application of the new standards.

Once again, moreover, the Court in *Stovall* noted that for purposes of deciding the issue of retroactivity, no distinction was justified between final convictions and convictions at various stages of trial and direct review. In denying retroactive effect to new rules involving identification at police lineups, the Court determined the facts of reliance and burden were entitled to such overriding significance as to make the above distinction unsupportable. The wisdom of limiting the retroactive application of a new rule so as to give the rule such effect in only the case in which the rule is announced has, however, been questioned in many dissenting and concurring opinions. *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring); *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (Marshall, J., concurring in part and dissenting in part); *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53

L.Ed.2d 306 (1977) (Marshall, J., concurring and Powell, J., concurring).

Thus, the United States Supreme Court set up the *Stovall* criteria to act as guidelines to resolve the retroactivity issue. Using these guidelines, the United States Supreme Court has "held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights."[3] *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). This Court has noted that each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice. Going further, the way in which these factors combine must inevitably vary with the rule involved, so as to require that the issue of retroactivity be determined in each case by looking to the peculiar traits of the specific rule in question. *Johnson v. New Jersey*, supra.

In the latest retroactivity case, *Hankerson v. North Carolina*, supra, the United States Supreme Court followed its setting up of a hierarchy among the nonretroactivity criteria with the foremost factor being the purpose to be served by the new rule. In concluding the *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), rule, requiring States to establish all elements of a criminal offense beyond a reasonable doubt, should be given retroactive application, the United

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[3] *See* footnote 3 of *Williams v. United States*, supra, for a list of cases and sources dealing with the retroactivity issue. To list every case where retroactivity or nonretroactivity was applied would prove too burdensome.

States Supreme Court reiterated a principle previously announced in *Ivan V. v. City of New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), and *Williams v. United States*, supra:

> While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider the state's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the factfinding process is sufficiently small; where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect.

Thus, in applying the *Stovall* criteria, the Court must first look to the purpose of the new constitutional doctrine. If such purpose enhances the integrity of the factfinding process, complete retroactivity applies.[4] If this issue is close, then the Court proceeds to the remaining criteria of reliance and effect. Before applying the criteria to the new constitutional ruling in *Burch*, this new ruling requires an inquiry of how the Court has viewed the retroactive issue in past Sixth Amendment right to jury trial rulings. This necessity arises since the *Burch* ruling originated in the Sixth Amendment right to a jury trial.

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[4]Examples of such findings included *Hankerson v. North Carolina*, supra; *Ivan V. v. City of New York*, supra; *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1921, 20 L.Ed.2d 1100; and *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969).

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the United States Supreme Court established new rules for the composition of juries in capital cases. The Court in footnote 22, rejected the losing party's plea for pure prospectivity finding full retroactivity appropriate despite considerations of reliance and effect. The Court noted the jury selection standards employed in violation of the new rule necessarily undermined the very integrity of the process which decided an accused's fate.

The Court denied retroactive effect to new rules guaranteeing the right to be tried by a jury rather than by a judge. In *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), the Court noted the values implemented by the right to jury trial would not be served by retrying all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. In denying the *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), rule retroactive effect, the Court applied the *Stovall* criteria. *Duncan*'s purpose for jury trials generally tends to prevent arbitrariness and repression, but the Court stated that not every criminal trial or any particular trial held before a judge is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. The Court found good faith reliance upon past Court opinions to the effect that the Sixth Amendment right to jury trial was not applicable to the States. Finally the Court found the impact on law enforcement and the administration of justice to be significant since denial of jury trials had occurred in large numbers.

DeStefano also ruled that the *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), rule, which extended the right to jury trial to include trials

for serious criminal contempt, is not to be applied retroactively. After noting the considerations are more evenly balanced with regard to this rule as opposed to the *Duncan* rule, the Court applied *Stovall.* The purpose factor proved very close. One ground for *Bloom* was the belief that contempt trials would be more fairly tried if a jury determined guilt. Unlike the judge, the jury will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. The Court, however, pointed out that the tradition of nonjury trials for contempt was more established than .the view that States could dispense with jury trials in normal criminal prosecution. Thus, reliance on past cases overturned by *Bloom,* was more justified. Also, the adverse effects on administration of justice would be substantial.

The Court in *Gosa v. Mayden,* 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), held non-retroactive the earlier decision in *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), that persons in the armed forces are entitled to a civilian trial for offenses that are not service-connected. Applying the *Stovall* criteria, a plurality opinion noted that the fact that a new judicial rule tends incidentally to improve or enhance the reliability of the truthfinding process does not in itself mandate the rule's retroactive application. Going further, the Court emphasized retroactivity is not required by a determination. The old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

In concluding the purpose behind the rule enunciated in *O'Callahan* does not mandate retroactivity, the Court

stated that although *O'Callahan* was critical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, the decision there "certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process." In concluding the reliance factor favors prospectivity, the Court absolved the military as not to be faulted for its reliance on the law as it stood before *O'Callahan* and for not anticipating a clear break with the past. Finally, the Court concluded the effect on the administration of justice would be substantial.

In *Daniel v. Louisiana,* the United States Supreme Court, per curiam, ruled the *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), rule, that exclusion of women from jury venire deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community, is not to be applied retroactively. After citing *DeStefano v. Woods,* supra, the Court applied the three *Stovall* factors. The Court found the purpose to be served by this new standard, as in *Duncan,* concerned the function played by the jury to prevent arbitrariness and repression. The Court concluded this purpose did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with the Sixth Amendment. In *Taylor,* the Court stated:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular compo-

> sition [citations omitted]; but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

Taylor was not so much concerned with the actual make-up of a particular jury, as with the opportunity for women to be empaneled on a jury. Thus, not every criminal trial or any particular trial held before a jury whose jury venire did not discriminate against women is unfair or any particular trial held before such a jury may never be as fairly treated by such a jury as he would be by a jury venire which had discriminated against women.

Thus, when dealing with a retroactive issue for rulings arising out of the Sixth Amendment's right to a jury trial, the United States Supreme Court characteristically applies the *Stovall* criteria. When the purpose to be served by the new standard goes to the heart of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the Court applies the new ruling retroactively—as in *Witherspoon v. Illinois,* supra. When this first criteria presents a close issue, the Court considers the remaining two criteria—as in *DeStefano v. Woods,* supra; *Gosa v. Mayden,* supra; and *Daniel v. Louisiana,* supra. In each of these cases, the Court based its nonretroactive decision on the general purpose of the right to jury trial tending to prevent arbitrariness and repression without going into the inner, more specific, operations of a particular jury. The Court hinted at this more narrow consideration in *Witherspoon,* stating jury-selection standards could undermine the integrity of the guilt-determining process. This leads to the third and final step in the thought process which leads to a retroactive application of the *Burch* ruling.

In the present situation, the United States Supreme Court clearly states the purpose of its decision in *Burch v. Louisiana,* supra:

> However, much the same reasons that led us in *Ballew* to decide that use of a five member jury threatened the fairness of the proceeding and proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous.

This *Burch* rule greatly enhances the integrity of the factfinding process by preserving the substance of the jury trial and the uprightness of the guilt-determining conduct (as was found in *Witherspoon v. Illinois,* supra). This new rule raises serious questions concerning the accuracy of guilty verdicts in past trials. The Court in *Burch* relied on *Ballew v. Georgia,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). The Court in *Ballew* held the purpose and functioning of the jury in a criminal trial is seriously impaired to a constitutional degree by a reduction in size below six members. In so concluding, the Court went beyond considering only the general purpose of jury trials of preventing arbitrariness and repression, and delved into the more specific operations and functioning of a jury. The Court drew on five specific concerns. First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberations. Second, the data raises doubts about the accuracy of the results achieved by smaller and smaller panels. Third, the data suggests the verdicts of jury deliberation in criminal cases will vary as juries become smaller; and that the variance amounts to an imbalance to the detriment of one side, the defense.

Fourth, the data suggests the minority viewpoint will adhere to his position more frequently when he has at least one other person supporting his argument, which foretells problems not only for jury decision making, but also for the representation of minority groups in the community. Fifth, several researchers have identified methodological problems tending to mask differences in the operation of smaller and larger juries.

These narrow concerns lead to one conclusion—as the jury size decreases, the reliability of the jury decreases along with the accuracy of a guilty verdict. Thus, to improve this accuracy the Court in *Ballew* struck down five-person juries; likewise the Court in *Burch* struck down nonunanimity in six-person juries. The Court, in these two cases, recognizes the general jury trial purpose as opposed to a judge trial; but, the Court recognizes more specific purposes linked to the workings and deliberations of a jury trial which need to be considered once an accused chooses the jury trial over a judge trial. As *Ballew* and *Burch* point out, these specific purposes originate in the Sixth Amendment. Thus, the first, and foremost, criteria points toward retroactive application in the present situation.

Although the United States Supreme Court has not formally ruled on the retroactivity issue concerning the rule announced in *Ballew*, the Court has, in effect, applied *Ballew* retroactively. In *Robinson v. Georgia*, 435 U.S. 991 (1978), where defendant raised the jury size issue, the United States Supreme Court vacated the lower court's judgment and remanded the case in light of *Ballew v. Georgia*, supra. Since the Court is willing to treat *Ballew* retroactively, then the Court must be willing to treat *Burch* retroactively since *Burch* relied on *Ballew*'s rationale.

The final two considerations also point towards retroactive application of the *Burch* rule. Although law enforcement authorities may have relied on authority for nonunanimous verdicts, petitioner contends *Ballew v. Georgia*, supra, and *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), clearly foreshadowed in holding in *Burch*, thus obviating any good faith reliance. Finally, the effect on the administration of justice would be small. The Court in *Burch* pointed out only two states had previously allowed nonunanimous six-person juries. Within these states, the issue raised here would be moot in all convictions rendered by a 6-0 verdict. Also, most cases tried before six-person juries in Louisiana usually do not merit long prison terms. Thus, most defendants who were improperly convicted have probably served their terms and left prison. Unfortunately, no Louisiana State Agency compiles statistics on the needed information. Therefore, there is no method of accurately determining how many prisoners this opinion will affect.

It is impossible, in the present situation, to guage the precise effect of a retroactive ruling, but States have no justifiable interest in convicting the innocent, or in overriding the defendant's right to a trier of fact who will carefully weigh and scrupulously balance every item of proof. In any event, if the Court must decide between fundamental constitutional rights and administrative convenience, surely constitutional rights should go wrongly to jail.

Even if the Court applies the ruling in this case prospectively, the petitioner here should be afforded the benefit of the rule. There is no equitable consideration which should impel the Court to distinguish among the litigants whose cases serve as the vehicle to adjudication

of a new rule of constitutional law. Every party whose case is involved, including those whose cases were not final at the time of the new ruling, should be treated alike. Thus, cases still pending on direct review should receive full benefit of the Court's supervening constitutional decision. In the present case, petitioner's conviction was not yet final when the United States Supreme Court handed down its opinion in the *Burch* case. That opinion is dated April 17, 1979, whereas the Louisiana Supreme Court didn't affirm petitioner's conviction until May 21, 1979. This raises the basic question of why should the Constitution mean one thing to the defendant in *Burch* and another to the present petitioner, particularly when both litigants are situated similarly in all pertinent respects.

Petitioner submits the answer to this question lies in the fact the situation in the present case points towards full retroactivity of the rule handed down in *Burch v. Louisiana,* supra. The Louisiana Supreme Court erred in not so ruling.

CONCLUSION

It is respectfully requested that the ruling handed down by the Louisiana Supreme Court in *State v. Darnell Brown,* 371 So.2d 746 (1979), be reversed. Thus, the rule announced in *Burch v. Louisiana,* supra, striking down a state statute allowing convictions by a nonunanimous six-person jury, should be given full retroactive

effect. If this Honorable Court is unwilling to give full retroactive effect to this ruling, it is respectfully requested this ruling should apply to the petitioner's case and all cases which have not yet become final which raise this same constitutional issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

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TABLE OF CONTENTS

Page

Statement of the Case 1

Argument 4

I. The Law of Retroactivity in General 4

II. Purpose of Burch v. Louisiana 13

III. Reliance on the Pre-existing Standard 20

IV. The Impact on the Administration of Justice 24

Rebuttal 29

Conclusion 31

Certificate 32

TABLE OF AUTHORITIES

Adams v. Illinois, 495 U.S. 278 (1972) 19,28

Apodaca v. Oregon, 406 U.S. 404 (1972) .. 15,16,21,22

Arsenault v. Massachusetts, 393 U.S. 6 (1968) 9,18

Baldwin v. New York, 399 U.S. 66 (1970) 14,21,22

Ballew v. Georgia, 435 U.S. 223 (1978) 16,22

Barber v. Page, 390 U.S. 719 (1968) 23

Benton v. Maryland, 395 U.S. 784 (1969) 6

Berger v. California, 393 U.S. 314 (1968) 9,23

Bloom v. Illinois, 391 U.S. 194 (1968) 9,19

Bruton v. United States, 391 U.S. 123 (1968) 9,23

TABLE OF AUTHORITIES (Continued)

Page

Burch v. Louisiana, ____U.S. ____, 99 S.Ct. 1623 (1979) 16,17,20,21

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 5

Chimel v. California, 395 U.S. 752 (1969) 10

Coleman v. Alabama, 399 U.S. 1 (1970) 19,28,29

Daniel v. Louisiana, 419 U.S. 31 (1975) 17

Desist v. United States, 394 U.S. 244 (1969) 9

DeStefano v. Woods, 392 U.S. 631 (1968) ... 9,12,15,19

Duncan v. Louisiana, 391 U.S. 145 (1968) 9,13,15,19,21,22

Escobedo v. Illinois, 378 U.S. 378 (1964) 7,8,19

Fuller v. Alaska, 393 U.S. 80 (1968) 9

Furman v. Georgia, 408 U.S. 238 (1972) 6

Gideon v. Wainwright, 372 U.S. 335 (1963) 6,18

Gilbert v. California, 388 U.S. 263 (1967) 8,19

Gosa v. Mayden, 413 U.S. 655 (1973) 11,19,28

Great Northern Railway v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932) 5

Griffin v. California, 380 U.S. 609 (1965) 6,19,29

Griffin v. Illinois, 351 U.S. 12 (1956) 6

Grosso v. United States, 390 U.S. 62 (1968) 11

Hankerson v. North Carolina, 432 U.S. 233 (1977) 12,18,30

TABLE OF AUTHORITIES (Continued)

Page

In re Winship, 397 U.S. 358 (1970) 12

Ivan v. City of New York, 407 U.S. 203 (1972) 12

Jackson v. Denno, 378 U.S. 368 (1964) 6,9,18

Johnson v. Louisiana, 406 U.S. 356 (1972) ... 15,21,23

Johnson v. New Jersey, 384 U.S. 719 (1966) 7,14,17,19,21,30

Katz v. United States, 389 U.S. 347 (1967) 9

Lee v. Florida, 392 U.S. 378 (1968) 9

Linkletter v. Walker, 381 U.S. 618 (1965) 5,29

McConnell v. Rhay, 393 U.S. 3 (1968) 9

Mackey v. United States, 401 U.S. 667 (1971) 11,30

Mapp v. Ohio, 367 U.S. 643 (1961) 5,29

Marchetti v. United States, 290 U.S. 39 (1968) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 7,8,19

Mullaney v. Wilber, 421 U.S. 684 (1975) 12

O'Callahan v. Parker, 395 U.S. 258 (1969) ... 11,19,20

Pointer v. Texas, 380 U.S. 400 (1965) 23

Roberts v. Russel, 392 U.S. 293 (1968) 23

Robinson v. Georgia, 435 U.S. 991 (1978) 16

Robinson v. Neil, 409 U.S. 505 (1973) 6

Stovall v. Denno, 388 U.S. 293 (1967) 8,19,30

Taylor v. Louisiana, 419 U.S. 293 (1975) 17

TABLE OF AUTHORITIES (Continued)

Page

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 6,19,29

United States v. United States Coin and Currency, 401 U.S. 715 (1970) 6,11

United States v. Wade, 388 U.S. 218 (1967) 8,19

Waller v. Florida, 397 U.S. 387 (1970) 6

Williams v. Florida, 399 U.S. 78 (1970) ..13,15,16,21,22

Williams v. United States, 401 U.S. 646 (1971) 10,30

Witherspoon v. Illinois, 391 U.S. 510 (1968) 9

La. Const., Art. I, sec. 17 2

La. Code Crim. Pro. Art. 775 (West Supp. 1979) 27,28

La. Code Crim. Pro. Art. 779(A) (West Supp. 1979) 3

La. Code Crim. Pro. Art. 782 (West Supp. 1979) 3

La. Code Crim. Pro. Art. 782(A) (West Supp. 1979) 3,4

La. Code Crim. Pro. Art. 812 (West Supp. 1979) 27

La. R.S. 14:28 (West 1974) 25

La. R.S. 14:32 (West 1974) 25

La. R.S. 14:34 (West Supp. 1979) 25

TABLE OF AUTHORITIES (Continued)

Page

La. R.S. 14:34.1 (West Supp. 1979) 25

La. R.S. 14:38.1 (West Supp. 1979) 25

La. R.S. 14:43 (West Supp. 1979) 25

La. R.S. 14:45 (West 1974) 25

La. R.S. 14:53 (West 1974) 25

La. R.S. 14:55 (West 1974) 25

La. R.S. 14:56 (West 1974) 25

La. R.S. 14:57 (West 1974) 25

La. R.S. 14:58 (West 1974) 25

La. R.S. 14:62 (West Supp. 1979) 3, 25,27

La. R.S. 14:63 (West 1974) 3

La. R.S. 14:65 (West 1974) 25

La. R.S. 14:67 (West 1974) 3,25

La. R.S. 14:69 (West 1974) 3,25

La. R.S. 14:71 (West Supp. 1979) 25

La. R.S. 14:72 (West 1974) 25

La. R.S. 14:76 (West 1974) 25

La. R.S. 14:77 (West 1974) 25

La. R.S. 14:78 (West 1974) 25

La. R.S. 14:80 (West Supp. 1979) 25

La. R.S. 14:81 (West Supp. 1979) 25

TABLE OF AUTHORITIES (Continued) Page

La. R.S. 14:82 (West Supp. 1979) 25
La. R.S. 14:84 (West Supp. 1979) 25
La. R.S. 14:86 (West Supp. 1979) 25
La. R.S. 14:87.4 (West 1974) 25
La. R.S. 14:89 (West Supp. 1979) 25
La. R.S. 14:92 (West Supp. 1979) 25
La. R.S. 14:93 (West Supp. 1979) 25
La. R.S. 14:94 (West 1974) 25
La. R.S. 14:95 (West Supp. 1979) 25
La. R.S. 14:96 (West Supp. 1979) 25
La. R.S. 14:98 (West Supp. 1979) 25
La. R.S. 14:106 (West Supp. 1979) 25
La. R.S. 14:110 (West Supp. 1979) 3,25
La. R.S. 14:111 (West 1974) 25
La. R.S. 14:118 (West 1974) 25
La. R.S. 14:118.1 (West 1974) 25
La. R.S. 14:119 (West 1974) 25
La. R.S. 14:119.1 (West 1974) 25
La. R.S. 14:120 (West 1974) 25
La. R.S. 14:122 (West Supp. 1979) 25
La. R.S. 14:125 (West 1974) 25
La. R.S. 14:126.1 (West 1974) 25

TABLE OF AUTHORITIES (Continued) Page

La. R.S. 14:126.2 (West 1974) 26
La. R.S. 14:131 (West 1974) 26
La. R.S. 14:132 (West 1974) 26
La. R.S. 14:133.1 (West Supp. 1979) 26
La. R.S. 14:138 (West 1974) 26
La. R.S. 14:140 (West Supp. 1979) 26
La. R.S. 14:141 (West 1974) 26
La. R.S. 14:201 (West 1974) 26
La. R.S. 14:202 (West 1974) 26
La. R.S. 14:207 (West 1974) 26
La. R.S. 14:209 (West 1974) 26
La. R.S. 14:210 (West 1974) 26
La. R.S. 14:211 (West 1974) 26
La. R.S. 14:212 (West 1974) 26
La. R.S. 14:219 (West 1974) 26
La. R.S. 14:220 (West 1974) 26
La. R.S. 14:221 (West 1974).....26
La. R.S. 14:222 (West 1974) 26
La. R.S. 14:227 (West Supp. 1979) 26
La. R.S. 14:285 (West 1974) 26
La. R.S. 14:351 (West 1974) 26
La. R.S. 14:352 (West 1974) 26

TABLE OF AUTHORITIES (Continued)

Page

La. R.S. 14:356 (West 1974) 26

La. R.S. 14:401 (West 1974) 26

La. R.S. 14:402 (West 1974) 26

La. R.S. 14:402.1 (West Supp. 1979) 26

La. R.S. 14:511 (West Supp. 1979) 26

La. R.S. 14:512 (West Suppl. 1979) 26

La. R.S. 14:513 (West Supp. 1979) 26

La. R.S. 15:529.1 (West Supp. 1979) 3,27

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF THE STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

On July 20, 1978 Levertes Dorsch and her daughter, Kenella Dixon were living, respectively, at 2930 and 2932 Florida Avenue, in a double "shotgun"-type house, located in New Orleans, Louisiana. On the

morning of July 20, Ms. Dixon drove her mother to her job as a domestic maid, ran some errands, and returned home at about 10:00 A.M. Upon her arrival she heard footsteps coming from her mother's side of the duplex structure. Noticing that a rear window had been broken, she called the police. Petitioner was arrested inside Ms. Dorsch's apartment, as he attempted to flee. At the time of arrest, Petitioner was wearing rubber gloves. Investigation revealed that the residence had been ransacked, and that various items such as cameras, a television, and a radio had been packed into boxes and positioned at the rear door.

Consequently, on July 31, 1978 Petitioner was charged by Bill of Information with simple burglary, La. R.S. 14:62. Before trial, a Motion to Quash the jury was filed, and was denied by the court. On August 23, 1978 a six-member jury was empanelled, and after due proceedings, a verdict of guilty as charged was returned. A poll of the jury revealed that their vote was five guilty, one not guilty.[1] Thereafter, Petitioner filed

1 At the time of Petitioner's trial, Article I, Section 17 of the Louisiana Constitution of 1974 provided in pertinent part:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.

a Motion for New Trial, based on the illegality of the jury verdict, which was denied. Subsequently, the State filed a Bill of Information alleging that Petitioner was a third felony offender.[2] At the Multiple-Offender Hearing, the Petitioner plead guilty as charged, and was accordingly sentenced to serve twenty-two years at hard labor.

On appeal, the Louisiana Supreme Court affirmed the conviction and sentence. *State v. Brown*, 371 So.2d 746, (La. 1979). Brown then petitioned this Honorable Court for Certiorari, complaining that *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) should be applied retroactively to reverse his conviction. Certiorari was granted on December 10, 1979.

Louisiana Code of Criminal Procedure Article 779 (a) provided:

> A. A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six jurors, five of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure Article 782 (a) provided:

> A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.

2 La. R.S. 15:529.1. Petitioner had been previously convicted of felony theft on two occasions, La. R.S. 14:67; receiving stolen things, La. R.S. 14:69; simple escape, La. R.S. 14:110; criminal trespass, La. R.S. 14:63; and attempted simple burglary, La. R.S. 14(27)62.

ARGUMENT

The Decision of the United States Supreme Court in *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) Should be Given Prospective Application Only

Darnell Brown was charged in the instant proceeding with simple burglary, as defined in Article 62 of the Louisiana Criminal Code, for which the penalty was imprisonment in the parish prison or the state penitentiary for no more than twelve years.

Article I, Section 17, of the Louisiana Constitution of 1974 provided that a case in which the punishment may be in excess of six months shall be tried by a six-member jury, five of whom must concur to render a verdict. Article 782 of the Louisiana Code of Criminal Procedure implemented that constitutional provision.

Petitioner was convicted by the five-to-one vote of a six-member jury on July 20, 1978. This Honorable Court decided *Burch v. Louisiana*, ____U.S. ____, 99 S.Ct. 1623, on April 17, 1979. The State respectfully urges this Honorable Court to deny retroactive application to *Burch*, and affirm Petitioner's conviction.

I.

The Law of Retroactivity In General

The notion that judicial decisions involving constitutional criminal procedure might be given

prospective, rather than retrospective effect, was first specifically articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965).[3] In *Linkletter*, the Court held that the exclusionary rule announced in *Mapp v. Ohio*[4] was inapplicable to cases in which the convictions had become final before *Mapp* was decided.[5] In reaching its decision, the Court stated:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.
> 381 U.S., at 629.

The Court determined that since the purpose of *Mapp* was to deter improper police activity, this deterrent function would not be served by retroactive

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3 Prior to *Linkletter*, this Honorable Court had held that State Courts might apply new rules prospectively or retroactively. *See, e.g., Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Great Northern Railway v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). *Linkletter*, differed in that it was a criminal procedure case in which the defendant sought the benefit of a newly announced procedural rule. Further, it involved a federal constitutional question; whereas earlier cases had come from State Courts, or had involved statutory or common-law matters.

4 367 U.S. 643 (1961).

5 *Linkletter* involved only convictions on collateral review. *Mapp* had previously been applied to cases on direct review, by its own terms. 381 U.S., at 622.

application. The Court went on to discuss three recent retroactive decisions,[6] and isolated the factor that occupies a central role in the law of retroactivity: Does the legal principle involved go to the "fairness of the trial, the very integrity of the fact-finding process"? 381 U.S., at 639.[7]

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966) the Court held that the Fifth Amendment rule articulated in *Griffin v. California*,[8] was to be given prospective effect. The Court characterized the privilege against self-incrimination as safeguarding values other than the fairness of the fact-finding process.[9] It

6 *Jackson v. Denno*, 378 U.S. 368 (1964) (right to a preliminary determination by a judge of the voluntariness of a confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel in a felony case); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to a free trial transcript on appeal).

7 *But see: Robinson v. Neil*, 409 U.S. 505 (1973) where the court gave retroactive effect to *Benton v. Maryland*, 395 U.S. 784 (1969) and *Waller v. Florida*, 397 U.S. 387 (1970), which established double jeopardy rules of the federal constitution are applicable to the States. The Court found the *Linkletter* analysis inappropriate, since *Benton* and *Waller* did not raise issues of evidence or mode of trial. *See also: Furman v. Georgia*, 408 U.S. 238 (1972); *United States v. United States Coin and Currency*, 401 U.S. 715 (1970).

8 *Griffin v. California*, 380 U.S. 609 (1965) (prohibiting adverse comment on a defendant's failure to testify). *Tehan* denied retroactivity to only those cases on collateral review, because *Griffin*, by its terms, applied to cases pending on direct review at the time of its decision. *See* note 5 *supra*.

9 "'First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load!" 382 U.S. at 414, 415.

emphasized countervailing factors: reliance of prosecutors on the prior jurisprudence and the profound impact on the administration of justice that retroactivity would involve. 382 U.S., at 417.

The Court's decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966) denied retroactive application[10] to *Escobedo v. Illinois*[11] and *Miranda v. Arizona*[12] and further refined the relevant inquiry. Arguably, the purpose of *Miranda* and *Escobedo* did in fact go to the "essence of the fact-finding process." That is, to exclude coerced, and therefore suspect confessions. Significantly, the Court stated:

> . . . . the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.
>
> . . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial. 384 U.S., at 728-29.

10 The Court ruled, specifically, that *Miranda* and *Escobedo* applied only to trials begun after the dates of those decisions. 384 U.S., at 732. Additionally, the court rejected any distinction between cases on direct or collateral review for the purposes of retroactivity. *Id.*

11 378 U.S. 478 (1964).

12 384 U.S. 436 (1966).

Additionally, the Court emphasized the disruptive impact of retroactivity on the administration of the criminal laws. 384 U.S., at 731. For the first time it recognized that reliance on prior law was justified because *Escobedo* and *Miranda* had not been "foreshadowed" by earlier holdings. *Id.*

In *Stovall v. Denno,* 388 U.S. 293 (1967) the Court denied retroactive application[13] to *United States v. Wade* and *Gilbert v. California,* [14] and established the so-called "three-pronged" test for retroactive application:

> The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. 388 U.S., at 297.

As to the first factor, the Court noted that the purpose of *Wade* and *Gilbert* was to avoid unfairness by enhancing the reliability of the fact-finding process. However, balancing "purpose" against the "reliance"

13 The Court focused its attention on the time of the constitutional violation, not on the start of the trial, as it had in *Johnson,* 388 U.S. at 296.

Significantly, as in *Johnson, supra,* the Court refused to distinguish cases pending on direct review from cases on collateral review. 388 U.S. at 300, 301.

14 *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California,* 388 U.S. 263 (1967) involved the right to counsel at pretrial line-ups.

and "effect" factors, the Court found retroactive application inappropriate, and noted:

> The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities' . . . . Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity on the administration of justice. 388 U.S., at 298.[15]

Desist v. United States, 394 U.S. 244 (1969) denied retroactive effect to *Katz v. United States,*[16] since its

15 In the 1968 Term, the Court applied the *Stovall* balancing test to numerous questions of constitutional criminal procedure. In *Witherspoon v. Illinois,* 391 U.S. 510 (1968) the Court determined that improper jury selection could undermine the integrity of the fact-finding process, and that this factor outweighed reliance and effect. In *Roberts v. Russell,* 392 U.S. 293 (1968) the Court ruled that *Bruton v. United States,* 391 U.S. 123 (1968) applied retroactively because the prohibited procedure threatened the reliability of the verdict. Significantly, the Court determined that *Bruton* should have been anticipated after the decision in *Jackson v. Denno,* 378 U.S. 368 (1964).

See also: Arsenault v. Massachusetts, 393 U.S. 6 (1968) (right to counsel at certain preliminary hearings); *Berger v. California,* 393 U.S. 314 (1968) (constitutional right of confrontation); *McConnell v. Rhay,* 393 U.S. 3 (1968) (right to counsel at sentencing).

But C.F.: Fuller v. Alaska, 393 U.S. 80 (1968) (holding *Lee v. Florida,* 392 U.S. 378 (1968) to have prospective effect since its purpose was to encourage enforcement of federal law); *DeStefano v. Woods,* 392 U.S. 631 (1968) (holding *Duncan v. Louisiana,* 391 U.S. 145 (1968) and *Bloom v. Illinois,* 391 U.S. 194 (1968), involving the right to jury trial, to be prospective only). For a detailed discussion of *DeStefano, see* text at note 29, *infra.*

16 *Katz v. United States,* 389 U.S. 347 (1967) involved electronic surveillance activities, and overruled the pre-existing rules which turned on theories of physical intrusion.

deterrent purpose would not be served by retroactivity. Importantly, the Court ranked the first part of the Stovall test — purpose — as foremost among the factors to be considered:

> It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. 394 U.S., at 252.

Williams v. United States, 401 U.S. 646 (1971) dealt, as did *Desist*, with a Fourth Amendment question. In denying retroactive application to *Chimel v. California*[17] the Court succinctly stated the relevant inquiry:

> In both *Johnson* and *Stovall*, we frankly acknowledged that 'the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities" ' . . . . Where we have been unable to conclude that the use of such a 'condemned practice' in past criminal trials presents a substantial likelihood that the results of a number of those trials were factually incorrect, we have not accorded retroactive effect . . . 401 U.S., at 656, n7.[18]

17 *Chimel v. California*, 395 U.S. 752 (1969) involved warrantless searches incident to arrests.

The Court's decision in *Gosa v. Mayden*, 413 U.S. 655 (1973) denied retroactive effect to *O'Callahan v. Parker*.[19] That case established that military personnel are entitled to a civilian trial for non-service related offenses. In a plurality opinion the court characterized the *O'Callahan* principle as a "prophylactic rule" which only "incidently" enhanced the reliability of the fact-finding process. 413 U.S., at 680.

The Court stated:

> Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process. *Id.*

18 In *Mackey v. United States*, 401 U.S. 667 (1971), decided the same day as *Williams*, the Court denied retroactive effect to *Marchetti v. United States*, 290 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). The Court reasoned these decisions involved protection of the Fifth Amendment privilege, not the truth-seeking function of the trial. *But see: United States v. United States Coin and Currency*, 401 U.S. 715 (1970) (holding *Marchetti* and *Grosso* retroactive to the extent that they control conduct that cannot itself be constitutionally punished).

19 395 U.S. 258 (1969).

In reaching its decision, the *Gosa* Court placed heavy reliance on *DeStefano v. Woods,*[20] 392 U.S. 631 (1968), reasoning that the validity of convictions by military tribunals was not sufficiently in doubt to require retroactivity. 413 U.S., at 676.

The decisions in *Ivan v. City of New York,* 407 U.S. 203 (1972)[21] and *Hankerson v. North Carolina,* 432 U.S. 233 (1977),[22] when read together, further sharpen the issue before this Court. The essential question in both cases turned on "reasonable doubt," which the Court characterized as a "bedrock principle" whose enforcement lies "at the foundation of the administration of our criminal law." 432 U.S., at 241.

Ivan and *Hankerson* establish that:

> Where the *major* purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect. 432 U.S., at 243.

Since reasonable doubt is "substantial", retroactivity was determined in both cases.

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20 *See* text at note *30, infra.*

21 Holding *In re Winship,* 397 U.S. 358 (1970) to be retroactive.

22 Holding *Mullaney v. Wilbur,* 421 U.S. 684 (1975) to be retroactive.

In summary, when a constitutional rule of criminal procedure is at issue, the first inquiry should be directed to its "major" purpose. Retroactivity is appropriate if that purpose is to overcome as aspect of the trial that "substantially" impairs the truth-finding function and raises "serious" doubts about past verdicts. However, if the rule is "prophylactic" in nature, and only "incidently" enhances the reliability of the trial, the three-pronged *Stovall* test should determine its reach.

II. Purpose of *Burch v. Louisiana*

The State submits that the purpose of the Sixth Amendment right articulated in *Burch* does not mandate retroactive application.

The jurisprudence of this Honorable Court teaches that the purpose of trial by jury is to prevent government oppression by providing "a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[23] The jury's essential feature lies in the interposition, between the accused and his accuser, of the common-sense judgement of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[24] By its nature, the right to jury trial involves the integrity of

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23 *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968)

24 *Williams v. Florida,* 399 U.S. 78, 100 (1970).

the fact-finding process. However, the extent to which the condemned practice adversely affected that process is a question of degree.[25]

Respondent respectfully presents that the ultimate issue before this Honorable Court is whether the use of nonunanimous six-member juries in the past presents a substantial likelihood that the results of a number of trials were factually incorrect. Respondent maintains it does not.

This Honorable Court first considered the right to jury trial in the state courts in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Duncan struck down a Louisiana statute which provided that a crime punishable by up to two years imprisonment was triable by the judge alone. The Court held that because trial by jury in "serious"[26] criminal cases is "fundamental to the American scheme of justice" and essential to due process, the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case, which if tried in federal court, would require a jury under the Sixth Amendment. *Id*, at 149, 158-159. Similarly, in *Bloom v. Illinois*, 391 U.S. 194 (1968) the Court held that the right to jury trial extends to trials for serious criminal contempt.

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25 *Johnson v. New Jersey*, 384 U.S. 719, 728-29 (1966).

26 *Baldwin v. New York*, 399 U.S. 66 (1970) held "serious" offenses to be those punishable by more than six months imprisonment.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court held that the nine-to-three vote of a nonunanimous jury is not, *per se*, violative of due process.[27]

The Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970) held that six-member unanimous juries are not violative of the Sixth Amendment. The purpose of trial by jury, as noted in *Duncan*, is to prevent government oppression. The jury's essential feature lies in the "interposition between the accused and his accuser of the commonsense judgement of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S, at 100. These purposes can be fulfilled if the jury is of sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross-section of the community would be represented. *Id.*

In *Apodoca v. Oregon*, 406 U.S. 404 (1972) the court upheld a state law authorizing ten out of twelve verdicts. The Court held that unanimity does not materially contribute to the exercise of the "commonsense judgement" identified in *Williams*. The judgement of the defendant's peers will be interposed between him and the State whether the verdict is unanimous or nonunanimous. 406 U.S., at 412. Additionally, the

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27 The trial at issue occurred before *Duncan v. Louisiana*, 391 U.S. 145 (1968) and therefore the Sixth Amendment itself was not involved. *DeStefano v. Woods*, 392 U.S. 631 (1968).

Court ruled that unanimity is not a necessary precondition for application of the "cross-section" requirement. 406 U.S. at 413.

In *Ballew v. Georgia*, 435 U.S. 223 (1978) the Court, in separate opinions, held that juries composed of five persons violate the Sixth Amendment.[28] Admitting the difficulty of drawing a line between five and six member juries, ". . . . at least five members of the Court believed that reducing a jury to five persons in nonpetty cases raised sufficiently substantial doubts as to the fairness of the proceeding and the proper functioning of the jury . . ." *State v. Burch*, ____ U.S. at ____; 98 S.Ct., at 1038. Essentially, *Ballew* established that when juries are composed of fewer tha six persons their ability to deliberate effectively becomes questionable, and their representative character is doubtful.

Apodaca, *Williams*, and *Ballew*, when read together, indicate that effective group deliberation, as well as community representation are functions of the absolute *size* of a jury, rather than the count of its final verdict.

However, in *Burch v. Louisiana*, ____U.S. ____, 99 S.Ct. 1623 (1979) the Court held that:

28 Petitioner contends in brief that the Court has applied *Ballew*, retroactively, citing *Robinson v. Georgia*, 435 U.S. 991 (1978) which was vacated and remanded for consideration in light of *Ballew*. Respondent submits that this action is not be to equated with a finding of retroactivity. Further, that while *Ballew* and *Burch* are similar, application of the *Stovall* balancing test might well yield differing results.

> . . . . much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee . . . ____ U.S. at ____, 99 S.Ct., at 1628.

The Court freely admitted that its decision involved a line-drawing process which was not wholly satisfactory, but noted that lines must be drawn somewhere if the right to jury trial is to be preserved. ____ U.S. at ____; 99 S.Ct., at 1627.

For the following reasons the State submits that the purpose of *Burch* does not mandate retroactivity.

First, it is clear that the involvement of the right to jury trial is not a talisman that automatically implies retroactivity. *See e.g., Daniel v. Louisiana*, 419 U.S. 31 (1975) (holding *Taylor v. Louisiana*, 419 U.S. 522 (1975) to have prospective application). That is, the choice between retroactivity and nonretroactivity in no way turns on the "value" of the constitutional guarantee involved. *E.g., Johnson v. New Jersey*, 348 U.S. 719, 728 (1966).

Second, Respondent suggests that while *Burch* teaches that the vote of a unanimous six-member jury

is constitutionally preferrable to that of a nonunanimous jury, it does not stand for the proposition that nonunanimous verdicts have been *per se* wrongly-decided or unfair in the past. Although the Constitution requires demarcation lines to be drawn at some point, the same cross-section of the community interposes itself between accused and accuser whether all members or only five concur in the final judgment. Although a unanimous verdict may imply that a more perfect deliberation process has occurred, the fact that rational men disagree is not in itself equivalent to a failure of proof.

Third, the State submits that the nonunanimous six-member jury was not an institution that *substantially* impaired the truth finding process to such an extent that serious doubts are raised about the accuracy of past verdicts. *See Hankerson v. North Carolina*, 432 U.S., at 243. If it had been, the question presented in *Burch* would not have been as close as the Court characterized it: "We agree with the Louisiana Supreme Court that the question presented is a 'close' one." *Burch v. Louisiana*, ____ U.S., at ____, 99 S.Ct., at 1625. *Compare, Burch v. Louisiana with e.g., Hankerson v. North Carolina*, 432 U.S. 223 (1977) (burden of State to prove guilt beyond a reasonable doubt); *Arsenault v. Massachusetts*, 393 U.S. 6 (1968) (right to counsel at preliminary hearing where guilty plea entered); *Jackson v. Denno*, 378 U.S. 368 (1964) (right to preliminary determination of voluntariness of confession outside presence of the jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony trial).

Fourth, Respondent maintains that the purpose of *Burch* was to enhance the reliability of the jury verdict. However, this Honorable Court has refused retroactive application to numerous constitutional rules that are likewise directed at the reliability of the fact-finding process. *See e.g., Gosa v. Mayden*, 413 U.S. 665 (1973) (denying retroactive application to *O'Callahan v. Parker*, 395 U.S. 258 (1969)). *Adams v. Illinois*, 405 U.S. 278 (1972) (*Coleman v. Alabama*, 399 U.S. 1 (1970) not retroactive); *Stovall v. Denno*, 388 U.S. 293 (1967) (*United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive). *Johnson v. New Jersey*, 384 U.S. 719 (1966) (*Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966) not retroactive); *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966) (*Griffin v. California*, 380 U.S. 609 (1965) not retroactive).

As demonstrated by the above mentioned authorities, "retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining truth, or that the truth determining process was aided somewhat by the new standard." *Gosa v. Mayden*, 415 U.S., at 680.

Finally, Respondent submits that the decisions of the Court in *DeStefano v. Woods*, 392 U.S. 631 (1968) and *Gosa v. Mayden*, 413 U.S. 655 (1973) control the issue before the bar. In *DeStefano*, the Court, *per curiam*, applied the three-pronged test and denied retroactive application to *Duncan v. Louisiana*,[29] and *Bloom v. Illinois*.[30] These cases

29 391 U.S. 145 (1968).

30 391 U.S. 194 (1968).

involved serious criminal convictions where *no* jury, unanimous or nonunanimous, had interposed its commonsense deliberations between accused and accuser. Nevertheless, the Court stated: "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S., at 634.

O'Callahan, was applied prospectively despite the fact that Petitioner, having been denied trial by jury, was convicted by tribunal which the Court criticized as lacking procedural safeguards and being susceptible to improper "command influence", 413 U.S., at 680.

The State submits that since the complete lack of a jury is not a sufficient impairment of the fact-finding process as to require retroactivity, then the presence of one dissenting juror should likewise not trigger retroactive application.

In summary, the purpose of *Burch v. Louisiana* does not automatically mandate retroactive application. Therefore, examination of the second and third components of the *Stovall* test; "reliance" and "impact" are appropriate.

III. Reliance on the Pre-existing Standard

The second prong of the *Stovall* test addresses the reliance of law enforcement authorities and state

courts on the pre-existing law. The essential inquiry is whether the State should have forseen the new constitutional ruling, and changed the existing practices in anticipation of an inevitable Supreme Court pronouncement.[31]

Respondent maintains that at the time of Petitoner's conviction the State of Louisiana was conducting trials in good-faith reliance on existing law, and that the State cannot be charged with having anticipated *Burch v. Louisiana*.

At the time of Petitioner's trial, Article I, Section 17 of the Louisiana Constitution of 1974 provided that a crime punishable by more than six months imprisonment in the Parish jail was triable by a six member jury, five of whom must concur to render a verdict. Articles 779(A) of the Louisiana Code of Criminal Procedure implemented that constitutional provision.[32] These rules were enacted after, and in apparent reliance on, this Honorable Court's decisions in *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970); *Williams v. Florida*, 399 U.S. 78 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972).

The decisions of this Honorable Court had put the State on notice that:

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31 *See e.g., Johnson v. New Jersey*, 384 U.S. 719, 730 (1966).

32 *See* note 1, *supra*, for text of these provisions.

I. The Constitution requires that defendants charged with offenses punishable by more than six months imprisonment are entitled to a jury trial.[33]

II. Six-member juries are large enough to accomplish the purpose of the Sixth Amendment: prevent government oppression, deliberate effectively, and represent a cross-section of the community.[34]

III. Five-member juries are violative of the Sixth Amendment, because a demarcation line must be drawn at some point; statistical studies indicate that as jury size diminishes, commonsense deliberation become less likely, and the jury becomes less representative of the community.[35]

IV. Nonunanimous twelve-member juries (83.3% vote) can prevent oppression, exercise group commonsense and represent a fair cross section, just as unanimous juries.[36]

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33 *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970).

34 *Williams v. Florida*, 399 U.S. 78 (1970).

35 *Ballew v. Georgia*, 435 U.S. 223 (1978). *Ballew* was decided after the statutory framework, at Note 1, *supra*, was enacted.

36 *Apodaca v. Oregon*, 406 U.S. 404 (1972).

V. The nine-to-three vote (75%) of a nonunanimous jury is not violative of due process.[37]

The State submits that the jurisprudence existant at the time of Petitioner's conviction cannot reasonably be interpreted as "foreshadowing" the *Burch* decision.

For example, in *Roberts v. Russel*,[38] the Court applied the three-factor Stovall test to *Bruton v. United States*,[39] and determined that long and widespread attack on the old rule by the lower courts "foreshadowed" *Bruton*. 392 U.S., at 294. In *Berger v. California*,[40] the Court gave retroactive effect to the confrontation-clause rule of *Barber v. Page*,[41] noting that *Barber* had been "clearly foreshadowed if not preordained" by *Pointer v. Texas*.[42] 393 U.S., at 315.

In contrast, the converted issue in Burch had not engendered attacks in the lower courts, nor can this Court's decisions be said to have "clearly foreshadowed" the ruling.

Indeed, as the majority opinion in *Burch* states: "We agree with the Louisiana Supreme Court that the ques-

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37 *Johnson v. Louisiana*, 406 U.S. 356 (1972).

38 392 U.S. 293 (1968).

39 391 U.S. 123 (1968).

40 393 U.S. 314 (1979).

41 390 U.S. 719 (1968).

42 380 U.S. 400 (1965).

tion presented is a 'close' one." ____ U.S., at ____, 99 S.Ct., at 1625. Further, the Court explained:

> As in *Ballew*, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases." ____ U.S., at ____, 99 S.Ct. at 1627.

IV. Effect on the Administration of Justice

The State submits that a retroactive application of *Burch* would have a devastating effect on the administration of criminal justice in Louisiana.[43]

First, Respondent takes issue with Petitioner's contention that: ". . . . most cases tried before six-person juries in Louisiana usually do not merit long prison terms. Thus, most defendants who were improperly convicted have probably served their terms and left prison." (Brief of Petitioner, page 17) Numerous

43 No statistics are available concerning the number of persons currently in custody following convictions by nonunanimous six-member juries. Internal records of the Office of the District Attorney for Orleans Parish indicate that thirty-nine defendants were convicted in New Orleans by six-member juries during the period between January 1, 1979 and April 17, 1979, the date of *Burch*. Whether these convictions were unanimous or nonunanimous cannot be ascertained. *See* text at note 48, *infra*.

serious felonies have historically been triable by six-member juries in Louisiana.[44] Penalties range up to

44 *See, e.g.*, La. R.S. 14:28, inciting a felony, (West 1974); La. R.S. 14:32, negligent homicide, (West 1974); La. R.S. 14:34, aggravated battery, (West Supp. 1979); La. R.S. 14:34.1, second degree battery, (West Supp. 1979); La. R.S. 14:38.1, mingling harmful substances, (West Supp. 1979); La. R.S. 14:43, simple rape, (West Supp. 1979); La. R.S. 14:45, simple kidnapping, (West 1974); La. R.S. 14:53, arson with intent to defraud, (West 1974); La. R.S. 14:55, aggravated criminal damage to property, (West 1974); La. R.S. 14:56, simple criminal damage to property, (West 1974); La. R.S. 14:57, damage to property with intent to defraud, (West 1974); La. R.S. 14:58, contaminating water supplies, (West 1974); La. R.S. 14:62, simple burglary, (West Supp. 1979); La. R.S. 14:65, simple robbery, (West 1974); La. R.S. 14:67, theft, (West 1974); La. R.S. 14:69, receiving stolen things, (West 1974); La. R.S. 14:71, issuing worthless checks, (West Supp. 1979); La. R.S. 14:72, forgery, (West 1974); La. R.S. 14:76, bigamy, (West 1974); La. R.S. 14:77, abetting bigamy, (West 1974); La. R.S. 14:78, incest, (West 1974); La. R.S. 14:80, carnal knowledge of a juvenile, (West Supp. 1979); La. R.S. 14:81, indecent behavior with juveniles, (West Supp. 1979); La. R.S. 14:82, prostitution, (West Supp. 1979); La. R.S. 14:84, pandering, (West Supp. 1979); La. R.S. 14:86, enticing minors into prostitution, (West Supp. 1979); La. R.S. 14:87.4, abortion advertising, (West 1974); La. R.S. 14:89, crime against nature, (West Supp. 1979); La. R.S. 14:92, contributing to the delinquency of juveniles, (West Supp. 1979); La. R.S. 14:93, cruelty to juveniles, (West Supp. 1979); La. R.S. 14:94, illegal use of weapons or dangerous instrumentalities, (West 1974); La. R.S. 14:95, illegal carrying of weapon, (West Supp. 1979); La. R.S. 14:96, aggravated obstruction of a highway of commerce, (West Supp. 1979); La. R.S. 14:98, operating a vehicle while intoxicated, (West Supp. 1979); La. R.S. 14:106, obscenity, (West Supp. 1974); La. R.S. 14:110, simple escape; aggravated escape, (West Supp. 1979); La. R.S. 14:111, assisting escape, (West 1974); La. R.S. 14:118, public bribery , (West 1974); La. R.S. 14:118.1, bribery of sports participants, (West 1974); La. R.S. 14:119, bribery of voters, (West 1974); La. R.S. 14:119.1, bribery of parents of school children, (West 1974); La. R.S. 14:120, corrupt influencing, (West 1974); La. R.S. 14:122, public intimidation, (West Supp. 1979); La. R.S. 14:125, false swearing, (West 1974); La. R.S. 14:126.1, false

swearing for purpose of violating public health or safety, (West 1974); La. R.S. 14:126.2, false statements concerning denial of constitutional rights, (West 1974); La. R.S. 14:131, compounding a felony, (West 1974); La. R.S. 14:132, injuring public records, (West 1974); La. R.S. 14:133.1, obstruction of court orders, (West Supp. 1979); La. R.S. 14:138, public payroll fraud, (West 1974); La. R.S. 14:140, public contract fraud, (West Supp. 1979); La. R.S. 14:141, prohibited splitting of profits, fees, or commissions, (West 1974); La. R.S. 14:201, collateral securities, unauthorized use or withdrawal prohibited, (West 1974); La. R.S. 14:202, contractors, misapplication of payments prohibited, (West 1974); La. R.S. 14:207, motor vehicles, alteration or removal of identifying numbers prohibited; sale, etc. of motor vehicle with altered identifying numbers prohibited, (West 1974); La. R.S. 14:209, seals, breaking prohibited, (West 1974); La. R.S. 14:210, taxicabs, tampering with meter forbidden, (West 1974); La. R.S. 14:211, timber, wilful purchase when not paid for by seller prohibited, (West 1974); La. R.S. 14:212, timber, false statement by seller prohibited, (West 1974); La. R.S. 14:219, removal of building or structure from immovable property subject to a conventional mortgage or vendor's privilege, (West 1974); La. R.S. 14:220, rented or leased motor vehicles; obtaining by false representation, etc.; failure to return, (West 1974); La. R.S. 14:221, avoiding payment for telecommunication services, (West 1974); La. R.S. 14:222, possession, manufacture, sale or transfer of devices for avoidance of payment for telecommunications service or related offenses; seizure of devices, (West 1974); La. R.S. 14:227, identification number, personal property, alteration or removal prohibited, (West Supp. 1979); La. R.S. 14:285, telephone communications, improper language, harassment, (West 1974); La. R.S. 14:351, bail, sale, etc. of real estate securing, prohibited, (West 1974); La. R.S. 14:352, bribery of withdrawn candidates for office prohibited, (West 1974); La. R.S. 14:356, sheriffs, etc., solicitation of legal business prohibited, (West 1974); La. 14:401, demonstrations in or near building housing a court or occupied as residence by judge, juror, witness or court officer, (West 1974); La. 14:402, taking contraband to or from correctional institutions, (West Supp. 1979); La. 14:402.1, taking of contraband to state owned hospitals, (West 1974); La. R.S. 14:511, loansharking, (West Supp. 1979); La. R.S. 14:512, aggravated loansharking, (West Supp. 1979); La. R.S. 14:513, possession of loanshark records, (West Supp. 1979).

terms of twelve years at hard labor.[45] In the case of habitual felons, a conviction by a six-member jury can ultimately result in a sentence of life imprisonment.[46] Indeed, Petitioner's own sentence was twenty-two years at hard labor.[47] The logical conclusion of Petitioner's argument is, therefore, that those inmates serving the longest sentences, habitual felons, are the persons most likely to benefit from retroactive application.

Second, in many individual cases, it is impossible to determine whether or not a jury verdict was unanimous. Jury polls are not mandated by law, but must be requested by counsel.[48] When counsel did request a

45 *See e.g.*, La. R.S. 14:62, simple burglary, (West Supp. 1979).

46 La. R.S. 15:529.1

47 Appendix, page 3

48 Article 812, La. Code Crim. Pro. (West Supp. 1980) provides:

The Court shall order the clerk to poll the jury if requested by the state or the defendant. It shall be within the discretion of the court whether such poll shall be conducted orally or in writing by applying the procedures of Paragraph (1) or Paragraph (2) of this Article.

(1) Oral polling of the jury shall consist of the clerk's calling each juror, one at a time, by name. He shall announce to each juror the verdict returned, and ask him, "Is this your verdict?" Upon receiving the juror's answer to the question, the clerk shall record the answer.

If, upon polling all of the jurors, the number of jurors required by law to find a verdict answer "Yes", the court shall order the clerk to record the verdict and the jury shall be discharged. If, upon polling all of the jurors, the number required to find a verdict do not answer "Yes", the jury may be remanded for further deliberation, or the court may declare a mistrial in accordance with Article 775.

(2) The procedure for the written polling of the jury shall require that the clerk hand to each juror a separate

poll, the result was not necessarily made part of the record.[49] The reconstruction of the voting count from a silent record would be an onerous if not impossible task.[50]

Third, Respondent submits that retroactive application would involve not only expense and effort, but the wholesale release of prisoners found guilty by truthworthy evidence in conformity with previously established standards. In *Gosa v. Mayden*, 413 U.S. 665, 685 (1973) the Court observed:

> We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of guilt. Wholesale invalidation

piece of paper containing the name of the juror and the words "Is this your verdict?" Each juror shall write on the slip of paper the words "Yes" or "No" along with his signature. The clerk shall collect the slips of paper and make them available for inspection by the court and counsel, and record the results. If a sufficient number of jurors as required by law to reach a verdict answer "yes" the clerk shall so inform the court. Upon verification of the results, the court shall order the clerk to record the verdict and order the jury discharged. If an insufficient number required to find a verdict answer "Yes", the court may remand the jury for further deliberation, or the court may declare a mistrial in accordance with Article 775.

49 It has been the practice of some courts in Orleans Parish to conduct a written poll, examine the ballots, then merely note for the record that the verdict is lawful, without disclosing the count. The written ballots do not necessarily become part of the record.

50 C.F.: *Adams v. Illinois*, 405 U.S. 278 (1972) where the Court held that *Coleman v. Alabama*, 399 U.S. 1 (1970) was to be given prospective effect. In discussing the effect retroactivity might

> of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.

For the above-mentioned reasons, Respondent submits that retroactive application of *Burch* would seriously disrupt the administration of the criminal laws of the State of Louisiana.

Rebuttal

In brief, Petitioner argues that if the Court denies retroactive effect to *Burch*, then it should exhume the distinction[51] between cases pending on direct review

have on the administration of justice, the Court noted:

> "The task of conducting such hearings would be immeasurably complicated by the need to construct a record of what occurred. In Illinois, for example, no court reporter was present at pre-*Coleman* preliminary hearings and the proceedings are therefore not recorded".

51 The Court's decisions in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966) applied only to cases on collateral review; cases pending on direct review received the benefit of the newly articulated rule. However, this result was a foregone conclusion. Both *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Griffin v. California*, 380 U.S. 609 (1965) had been specifically applied to cases on direct review without discussion, before *Linkletter* was decided.

and those on collateral review. (Brief of Petitioner, page 17, 18) Essentially, he argues that it is unfair that *Burch*, a "chance beneficiary,"[52] should benefit from the Court's decision, while Petitioner similarly situated, does not.[53]

Respondent submits that it is well-settled that cases on direct review and collateral review are to be treated similarly for the purpose of the issue before the bar. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966); *Stovall v. Denno*, 388 U.S. 293, 300 (1967). The countervailing factors of "good-faith reliance" and the "impact on the administration of justice" which mandate prospectively as discussed above, admit no distinction. Further, Respondent submits that distinguishing cases on the basis suggested by Petitioner is not in any measure more equitable than the settled rule. Petitioner proposes no reason why those who have exhausted direct appellate avenues are less deserving of newly recognized constitutional rules than those who have not.

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52 *Stovall v. Denno*, 388 U.S. 293, 301 (1966).

53 Petitioner's contention has received consistent, although minority support throughout the jurisprudence of retroactivity. *See e.g., Hankerson v. North Carolina*, 432 U.S. 233, 246 (1977) (Powell J., concurring in the judgment); *Mackey v. United States*, 401 U.S. 667, 675-702 (Harlan, J., separate opinion); *Williams v. United States*, 401 U.S. 646, 665 (1971) (Marshall, J., concurring in part and dissenting in part).

CONCLUSION

Respondent urges that the purpose of *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) was to enhance the reliability of six-member jury verdicts. Retroactivity is inappropriate because the accuracy of prior verdicts is not in serious doubt. A prospective application of *Burch* is justified by the good-faith reliance of the criminal justice system on the pre-existing rules, and by the serious impact a retroactive ruling would have on the administration of the criminal laws of the State of Louisiana.

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